Supreme Court, U.S.
FILED
00 393 SEP 8 2000
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001
(212) 629-0590

* *Counsel of Record*

QUESTIONS PRESENTED

1. Whether Congress, by requiring local zoning boards to approve the construction of cellular phone towers[1] without regard to the health impact of high frequency radiation, has commandeered legislative processes of the states to administer a federal program, in violation of the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

2. Where Congress has failed to fund continuing Federal research into potential adverse health effects of radiation emission from cellular phone towers, does Congress have the power to prohibit State and local governments from protecting the health of their citizens by taking into account available research and official standards from other countries in regulating the placement of cellular phone towers?

---

[1] For convenience, the phrase "cellular phone towers" is used as shorthand in this petition to cover all personal wireless services facilities (PWSF).

PARTIES TO PROCEEDING

The full list of petitioners in this Court is as follows: Citizens for the Appropriate Placement of Telecommunications Facilities; Christopher Beaver of Noe Valley Families Against the Antennas; Maggie Fox; Major Belkin, M. Sue Storm of Healthy Home Alliance; Joseph Bogacz; Candice Brown and Gary Brown of Families for Appropriate Cellular Tower Siting; Jerry Davis; Mary-Croughan Minihane; Libby Kelley; Silvia M. Siegel; Annegret C. Topel; David Gell and Andrew J. Hillman of Ulysses Citizens for Responsible Technology; Holly A. Fournier; Richard Gianttiasio of Northboro Residents for Responsible Tower Siting; Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, and Roger Knowlton of Thistle Hill Neighborhood Alliance; Frank Goodrich; Marija Hughes, Mark Hutchins; Julie E. Jordan; Jeannine Karlsson; Dorothy Miller; Ed Steinman and Patricia Vaughey; Cathy Bergman-Venezia of The EMR Alliance; The EMR Alliance. There are no parent companies or wholly owned subsidiaries to be listed.

The parties to the proceeding in the Court of Appeals were Cellular Phone Taskforce, Ad-Hoc Association of Parties Concerned about the Federal Communications Commission Radio Frequency Health and Safety Rules, David Fichtenberg, Citizens for the Appropriate Placement of Telecommunications Facilities, John Bardis, Erica Zweig, of Telecommunications Master Plan Coalition of San Francisco, Christopher Beaver, of Noe Valley Families Against the Antennas, Major Belkin, Donna Casey, Maggie Fox, Eileen Lahey, Mark R. Shirley, M. Sue Storm, of Healthy Home Alliance, Joseph Bogacz, Candice Brown, Gary Brown of Families for Appropriate Cellular Tower Siting, Susan Clarke, of Environmental Health Advocacy League, Mary-Croughan Minihane, Libby Kelley, Silvia M. Siegel, Annegret C. Topel, of Citizens of Marin for Sensible Communications Planning, Jerry Davis,

Jean Foley, of Ulysses Citizens for Responsible Technology, Holly A. Fournier, Selectboard Member of Charlotte, VT and co-chair of Citizens for the Appropriate Placement of Telecommunications Facilities, Julianna Free, of Lifeline Resources, Inc., Anne Galloway, of Hardwick Action Committee, David Gell, Richard Gianattiasio, of Northboro Residents for Responsible Tower Siting, Dale A. Newton, Jane and L. Newton, Bernard Greenberg, Lorinda A. Knowlton, Roger Knowlton, of Thistle Hill Neighborhood Alliance, Cathy Bergman-Venezia, Frank Goodrich, Andrew J. Hillman, Marija Hughes, Mark Hutchins, Ralph E. Munston, of EMR Alliance, The EMR Alliance, Julie E. Jordan, of Coalition of Concerned Citizens for Responsible Technologies, Jeannine Karlsson, Commissioner of Town of Bedford Conservation Board, Patricia Kelley, Susan Lawrence, Emery Lazar, Dawn Mason, State of Washington Representative, Dorothy Miller, Advisory Neighborhood Commissioner, Edward Steinman, Peter de Pippo, Michael Worsham, The Communications Workers of America, AFL-CIO, CLC, CWA Local 7810, Rainer Waldman Atkins, Alan Golden, Virginia J. Moore-Ward and Faye Mueller-Hebert of the Rainier Valley Association for Safe Wireless Technology, Patricia Vaughey, Bill Jenkins of Olympia Washington Local 7810 of the Washington State Communication Workers of America (CWA) and the Council of Washington State CWA Locals, Petitioners. Cellular Telecommunications Industry Association, National Association of Broadcasters, Association for Maximum Service Television, Inc., Electromagnetic Energy Association and AT&T Wireless Services, Inc., Intervenors. Federal Communications Commission and United States of America, Respondents.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
Proceedings Below	3
The Telecommunications Act of 1996: The Clash Between Federal Policy and State Regulation	4
State and Local Input In Siting Decisions: The Compromise Enacted Into Law	5
Section 704	6
The FCC Standards	7
Practical Consequences of Supreme Court Reversal of Opinion Below	8
REASONS FOR GRANTING CERTIORARI	11
THE 10th AMENDMENT PRESERVES THE SYSTEM OF DUAL SOVEREIGNTY ESTABLISHED BY THE FRAMERS	14
RESPECTING THE SPIRIT OF DUAL SOVEREIGNTY PRESERVES DEMOCRACY	15

ARGUMENT

POINT I

CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SECOND CIRCUIT ON THE CONSTITUTIONALITY OF SECTION 704 OF TELECOMMUNICATIONS ACT OF 1996

The Fourth Circuit Decision 16

The Second Circuit Decision 17

POINT II

THE SECOND CIRCUIT DECISION CONFLICTS WITH RECENT DECISIONS OF THIS COURT PRESERVING THE INVIOLABLE SOVEREIGNTY RETAINED BY THE STATES 21

Congress Has Failed to Fund EPA Research Into Biological Effects of RF Emissions on Human Health 24

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

Alden v. Maine, 527 U.S. 706 (1999) ..... *Passim*

BellSouth Mobility Inc. v. Gwinnett County Georgia, 944 F. Supp. 923 (N.D. Ga. 1996) 18

Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000) ..... *Passim*

Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) 17

Genessee Tel. Co. v. Szmigel, 174 Misc.2d 567 (Sup. Ct. Monroe Cty, 1997) 12

Gregory v. Ashcroft, 501 U.S. 452 (1991) 14, 22

Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981) 13, 14

Illinois RSA No. 3 v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997) 18

Iowa Wireless Servs. v. City of Moline, 1998 WL 879518 (C.D. Ill.) 18

New York v. United States, 505 U.S. 144 (1992) ..... *Passim*

New York State Conference of Blue Cross and Blue Shield v. Travelers Ins. Co., 514 U.S. 645 (1995) ... 22

OmniPoint Corp. v. Zoning Hearing Bd. of Pine Grove, TP, 20 F. Supp. 2d 875 (E.D. Pa. 1998), *aff'd*, 181 F.3d 403 (3rd Cir. 1999) 18

Pegram v. Herdich, 530 U.S. ___, 120 S. Ct. 2143 (2000) 22

Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000) ..... *Passim*

Printz v. United States, 521 U.S. 898 (1997) ..... *Passim*

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1991) 21

United States v. Carolene Products, 304 U.S. 144 (1938) 13

United States v. Morrison, 529 U.S. __, 120 S. Ct. 1740 (2000) 2, 22

Reno v. Condon, 528 U.S. __, 120 S. Ct. 666 (2000) 13, 14, 21

Statutes:

28 U.S.C. Sec. 1254(1) 1

28 U.S.C. § 2342(1) 1

47 U.S.C. Sec. 332(c)(7)(B)(i) 7

47 U.S.C. Sec. 332(c)(7)(B)(ii) 6

47 U.S.C. Sec. 332(c)(7)(B)(iii) 6, 17

47 U.S.C. Sec. 332(c)(7)(B)(iv) 3, 4, 7, 17

47 U.S.C. Sec. 332(c)(7)(B)(v) 7

Pub. L. No. 104-104 4

Telecommunications Act of 1996, Section 704 ..... *Passim*

Other Authorities:

Calabresi, Stephen G. "Textualism and the Counter-majoritarian Difficulty," 66 *Geo.Wash.L.Rev.* 1373 (1998) 13

Dolk, Helen *et al. Cancer Incidence Near Radio and Television Transmitters in Great Britain. American Journal of Epidemiology*, Vol. 145, No. 1 (January 1997)..... 23

Foster, Heverty and Pugh, "An Analysis of Facility Siting Issues Under Section 704 of the Telecommunications Act of 1996," 30 *The Urban Lawyer*, 729 (1998) 12

Hocking B, Gordon IR, Grain HL, Hatfield GE, *Cancer Incidence and Mortality and Proximity to TV Towers*, *Med J Aust* 165(11-12):601, 1996 23

Levitt, B. Blake. *Electromagnetic Fields: A Consumer's Guide to the Issues and How to Protect Ourselves*, (Harcourt Brace, 1995)..... 7

Locke, *Second Treatise of Government* 22

Merrit, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563 (1994) 15

EEE Standard for Safety Levels with Respect To Human Exposure to Radio Frequency Electromagnetic Fields, 3kHz to 300 GHz, Approved Sept. 26, 1991 24

FCC Office of Engineering & Technology Bulletin 65, (ed. 97-01) 10

The Federalist No. 15..... 14

The Federalist No. 39 ..... 2, 21

Guidelines for Evaluating the Scientific Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123 (1996) 3

H.R. No. 104-204 (1995) 4, 5

H.R. Conf. Rep. No. 104-458 (1996) 5

Microwave News, "Switzerland Adopts Strict Limits for Cell Towers and Power Lines." January/February 2000, p. 1 10

Microwave News, "Italian Wireless Radiation Limits Enter Second Year," January/February 2000, p.7 10

Microwave News, "Efforts to Harmonize RF/MW Exposure Standards in Disarray," July/August 2000, p. 1 10

Microwave News, "U.K. Parliamentary Panel Seeks Stricter RF Limits, More Research," September/ October 1999, p. 1 10

Microwave News, September/October 1999 "Chinese RF/MW Exposure Standard Is the Strictest," p. 9.... 10

NCRP Report No. 86, issued April 2, 1986 24

Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332 (c)(7)(B)(v) of the Communications Act of 1934, 12 F.C.C. Rcd. 13494 (1997) 3

Note, "Wireless Facilities Are A Towering Problem," 40 *Wm. & Mary L. Rev.* 975 12

OPINIONS BELOW

The original opinion of the Court of Appeals is reported as *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000) and reproduced herein in the Appendix ("A") at A-1. The opinion of the United States Court of Appeals for the Second Circuit denying the petition for rehearing by the Cellular Phone Taskforce is reproduced at A-23. The opinion of the Second Circuit denying the petition for rehearing by Communications Workers of America is electronically reported at 2000 WL 862305 and reproduced herein at A-26. The Orders of the FCC are reported at 11 F.C.C. Rcd. 15123 (1996) and 12 F.C.C. Rcd. 13494 (1997) and have been lodged with the Clerk of this Court, due to their voluminous nature.

JURISDICTION

On February 18, 2000, the Court of Appeals affirmed the Orders of the FCC, thereby upholding the validity of the statutory and regulatory provisions in question. (A-22) On June 15, 2000, the Court of Appeals denied the timely petition for rehearing by the Communications Workers of America. Pursuant to Supreme Court Rule 13, this petition is filed within 90 days of that decision. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 2342(1).

CONSTITUTIONAL PROVISIONS

The constitutional provisions involved in this case are as follows:

> Article I, Clause 8 of the United States Constitution, which provides that "Congress shall have power to regulate commerce . . . among the several states. . . ."

Additional constitutional and statutory authorities are reproduced in the Appendix at A-28 through A-39.

STATEMENT OF THE CASE

This case challenges the Constitutionality of the Telecommunications Act of 1996 and FCC implementing regulations. Petitioners seek review of a Second Circuit decision upholding the constitutionality of the Act, to determine whether it conflicts with a line of Tenth Amendment/Commerce Clause decisions rendered by this Court in *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), *Alden v. Maine*, 527 U.S. 706 (1999) and *United States v. Morrison*, 529 U.S. __, 120 S. Ct. 1740 (2000). Review is also sought to resolve the direct conflict between the Second Circuit decision and a recent concurring opinion by Fourth Circuit Judge Niemeyer in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000).

In *New York*, this Court determined that under the Tenth Amendment, Congress could not compel states to pass legislation addressing a critical problem of public policy, *i.e.*, the shortage of disposal sites for hazardous radioactive waste. (505 U.S. at 175-177) This holding was expressly reconfirmed in *Printz*. 521 U.S. at 933. This case is the mirror-image of *New York*, inasmuch as it presents the issue of whether Congress may compel state or local governments to pass zoning legislation which *fails* to adequately address a crucial policy issue: *i.e.*, the health risks associated with radio frequency radiation from cellular phone tower sites. Petitioners contend that such an Act of Congress violates the holdings of both *Printz* and *New York*, as well as that of the very recent decision in *Alden*, which prohibits the Federal Government from infringing upon the "residuary and inviolable sovereignty" retained by the states (527 U.S. at 715, *quoting The Federalist No. 39*, at 245), and *Morrison*, which reconfirms that states possess a plenary police power which cannot be overridden by Congress. (120 S.Ct. at 1754) In *Petersburg*, *supra*, Circuit Judge Niemeyer concluded in his concurring opinion that provisions of the Act imposing

conditions on state and local regulation of the siting of cellular phone facilities were inconsistent with the principles of Federalism enunciated by this Court in these decisions.

Proceedings Below

Petitioners are "Citizens for the Appropriate Placement of Telecommunications Facilities" of Charlotte, Vermont, together with numerous other community citizens organizations and individual citizens from other parts of the country. Petitioners participated in administrative and judicial challenges to FCC regulations concerning the environmental and health effects of radio frequency emissions from cellular telephone facilities. The challengers appealed to the Second Circuit Court of Appeals from two final opinions and orders of the FCC. These orders set standards for human exposure to radio frequency radiation emitted from transmitters and facilities regulated by the FCC, including "personal wireless service facilities," commonly known as cellular phone towers. They also, *inter alia*, announced rules implementing section 704 (c)(7)(B)(iv) of the Telecommunications Act of 1996, which precluded state or local governments from regulating the siting of wireless service facilities on the basis of environmental effects, including health effects, provided the facilities comply with the aforementioned FCC emissions standards. *See Guidelines for Evaluating the Scientific Effects of Radiofrequency Radiation*, 11 F.C.C. Rcd. 15123 (1996) ("First Report and Order"); *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, 12 F.C.C. Rcd. 13494 (1997) ("Second Memorandum Opinion and Order").[2] Petitioners challenged the substantive guidelines on a number of statutory grounds and asserted that the regulatory prohibition, as well as the statutory provision on which it is

---

[2] Due to their voluminous nature, copies of these agency opinions have been lodged with the Clerk's office.

based (*codified* at 47 U.S.C. Sec. 332(c)(7)(B)(iv)), is unconstitutional facially and as applied.

The Second Circuit rejected all of petitioners' claims and upheld both of the FCC Orders. With respect to the Constitutional claims, the panel found that the prohibition on state regulation of the siting of wireless facilities was within the scope of Congress' legislative power under the Commerce clause and that the "statute does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment and set forth" in *New York* and *Printz*. (205 F.3d at 96.) (A-21) By decisions dated June 6, 2000 and June 15, 2000, respectively, the Second Circuit denied rehearing of its decision. (A-23) (A-26)

The Telecommunications Act of 1996:
The Clash Between Federal Policy and State Regulation

A primary purpose of the Telecommunications Act of 1996 was to "encourage the rapid deployment of new telecommunications technologies" such as wireless or cellular telephone service. (Pub. L. No. 104-104.) The Act instituted a major overhaul of wireless telecommunications regulation, in order to encourage the construction of a broad national network of communications towers for use by providers of cellular telephone and other wireless services. *See Petersburg*, 205 F.3d at 697. As Congress recognized, there were obvious tensions between the federal policy to encourage proliferation of cellular telephone facilities and state and local governments' desire to maintain control over local land use regulation. A clash between the two was inevitable. Indeed, as the legislative history reflects, a primary purpose of the Act was to override local zoning regulators, who were believed to standing in the way of industry plans for expansion. (*See id. quoting* H.R. Rep. No. 104-204 at 94 (1995) noting the legislators' view that "a conflicting patchwork" of state and local zoning requirements

was "inhibiting deployment" of wireless services.) Local concerns over the environmental effects of radio frequency emissions were a particular bone of contention, and local zoning decisions based on such concerns were singled out for preemption, allegedly because they were "at times not supported by scientific and medical evidence." (*See id quoting* H.R. Rep. No. 104-204 at 95.)

State and Local Input In Siting Decisions: The Compromise Enacted Into Law

Despite Congress's wish to prevent local governments from frustrating the federal policy of expansion, it also recognized that "there are legitimate State and local concerns involved in regulating the siting" of cellular telephone towers (*see* H.R. No 104-204 at 94-95), and that these authorities could not be completely excluded from the siting process. Congress therefore considered ways to provide for limited state and local input, while denying localities authority to base siting decisions on their independent assessment of health effects of radio frequency radiation in their communities. Under the House version of the Act, the FCC was given "authority . . . to regulate directly the siting of towers" (*Petersburg* at 205 F.3d at 698), while input from State and local governments was to come through their participation in a "negotiated rulemaking committee," along with industry representatives and public safety agencies. H.R. Conf. Rep. No. 104-458 at 207 (1996). The committee's purpose was to recommend a national siting policy for the FCC to implement which ensured that "the siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission (RF) emission levels." (H.R. 104-204 at 94.)

In contrast to the House bill, the Senate version of the Act permitted local governing bodies to continue to regulate the siting of cellular towers. *See Petersburg*, 205 F.3d at 698.

To resolve the conflict between the House and Senate versions of the bill, the Conference Committee created a new section 704 which was eventually enacted into law. This section preserved state and local authority over zoning and land use, *provided* that these governing bodies regulate in accordance with federally imposed standards enumerated in that section. (*See infra.*) The statute thereby delegates *responsibility* for siting decisions to local government, while retaining significant federal control over the *outcome* of such local regulation. In considering the constitutionality of such a siting arrangement, it is important to bear in mind the observation of this Court in *New York*, in connection with the choice of radioactive waste sites:

> If a federal official is faced with the alternative of choosing a location, or directing the states to do it, the official may well prefer the latter as a means of shifting responsibility for the ultimate decision.

(505 U.S. at 183)

Section 704

Specifically, Section 704 imposes substantive, procedural and evidentiary standards on state and local siting regulation, which in practical terms can effectively dictate the outcome of local zoning board deliberations. The procedural/evidentiary standards include requirements that zoning decisions regarding the placement, construction or modification of towers be issued "in writing," "in a reasonable period of time" and be "supported by substantial evidence contained in a written record." (47 U.S.C. Sec. 332 (c)(7)(B)(ii) and (iii).)

Substantively, the section prohibits state and local regulators from "unreasonably discriminating among providers"; mandates that local regulations "not prohibit or have the effect of prohibiting the provision of personal wireless services" (47 U.S.C. Sec. 332(c)(7)(B)(i)) and, most significantly for this petition, provides that:

> No state or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such facilities.

47 U.S.C. Sec. 332 (c)(7)(B)(iv).

The section also provides an enforcement mechanism, which makes the decisions of local authorities reviewable in state or federal Court "on an expedited basis." (47 U.S.C. Sec. 332(c)(7)(B)(v).)

The FCC Standards

The FCC adopted radio frequency emission standards in 1996 based on "thermal effects" from radiation (that is, the heating of human tissue — as in microwave ovens). The standards do not require any minimum distance between transmitters and human habitations. Although these standards are revised every ten years, to date no emission standards have been established by the FCC based on non-thermal "biological effects" from emissions at below-heating levels (that is, alterations of human cells, various cancers and other diseases).[3]

---

[3] As applied, the FCC standards do not take into account numerous research reports finding non-thermal effects. *See* B. Blake Levitt, *Electromagnetic Fields: A Consumer's Guide to the Issues and How to Protect Ourselves*. (Harcourt Brace, 1995).

Recent research in Europe, Australia and elsewhere has shown that cell phone frequencies may cause biological harm. In England, the U.K. Independent Expert Group on Mobile Phones, commissioned by the British government, issued a report in May, 2000, recommending that children under age 16 be discouraged from using cell phones. The report further recommends avoiding the siting of cell phone antenna installations near residences, schools, and hospitals. (One can examine the report at: http://www.iegmp.org.uk) The British minister of education has already sent notices to all British schools about the potential health risks for children from mobile phones.

Practical Consequences of Supreme Court Reversal of Opinion Below

In the event the Court should decide to set aside the preemption provisions of the Telecommunications Act of 1996 and the obsolescent FCC RF emissions regulations, the result will not be an anarchy of obstinate small town resistance to communications progress in the nation. Every local community has its share of residents and institutions who *want* access to reliable wireless communications technology, including:

Fire departments
Local and state police
Emergency ambulance services
Small businesses
Parents of teenagers
Repair services, etc.

These citizens, taxpayers, and public servants already do, and will continue to, urge elected zoning boards to approve construction of telecommunications towers.

The major change will be that local tower siting decisions will be made by *local* elected officials familiar with local

conditions who will be sensitive to the placement of towers close to schools, playgrounds, recreation areas, nursing homes, hospitals, residential areas and the like, and will exercise judgment based on these local conditions in light of current research into potential health effects of RF emissions. Concerned local citizens and public health officers are now able to keep elected local government officials informed about research developments *around the world* thanks to universal access to the Internet.[4]

The objective of this case is not to hobble technological progress, but to empower local officials to make intelligent decisions based on reliable information and direct knowledge of the communities they serve.

There is a wealth of information available about how other nations are handling human health concerns. The following schedule shows present maximum emission standards set by other countries around the world — *all* of them lower than the 1996 FCC permitted levels. These standards are sugges-

---

[4] Some of the leading websites are:

www.bioelectromagnetics.org
(Research organization of scientists)

www.iegmp.org.uk/IEGMPtxt.htm
(The Stewart report from England)

www.nrpb.org.uk.NIR-is.htm
(National Radiological Protection Board in England)

www.rsc.ca
(Royal Society of Canada)

www.microwavenews.com
(Newsletter edited by former NRDC staffer)

www.land-sbg.gv.at/
celltower/english/salzburg_resoluton_e.pdf
(Salzburg Resolution)

tive of what might be applied by individual local communities to tower siting decisions.

	Measurement in Public Exposure Limits: Microwatts Per Centimeter Squared[5]
United States	200.0
Italy	10.0
Poland	10.0
China	6.6
Switzerland	4.2
Russia	2.4
Moscow	2.0
Austria	0.1

The real answer, of course, is for Congress to appropriate funds for a comprehensive and continuing EPA-supervised study of non-thermal biological effects at different emission levels — that is why the outcome of this case is so important.

---

[5] The FCC limits vary depending on frequency. VHS limits are shown in the table. At cellular and personal communication services telephone frequencies, the FCC limits begin at about 500 microwatts and run as high as 1,000. *See FCC OET Bulletin 65*, (ed. 97-01) at pp. 67-68. Data for the other countries comes from: *Microwave News*, January/February 2000 "Switzerland Adopts Strict Limits for Cell Towers and Power Lines." pp. 1-6; *Microwave News*, January/February 2000, "Italian Wireless Radiation Limits Enter Second Year,"p.7; *Microwave News*, July/August 2000, "Efforts to Harmonize RF/MW Exposure Standards in Disarray," pp. 1-8; *Microwave News*, September/October 1999, "U.K. Parliamentary Panel Seeks Stricter RF Limits, More Research," pp. 1-10; *Microwave News*, September/October 1999 "Chinese RF/MW Exposure Standard Is the Strictest," pp. 9-10.

Currently there is no U.S. Government-funded research program into the non-thermal biological effects of RF emissions. EPA, which formerly conducted such research, lost all of its research funding in 1996, and has done nothing since. So long as telecommunications companies only have to comply with "thermal effects" standards and can otherwise put up towers pretty much wherever they want, the industry will obviously do all it can to *prevent* more research into biological effects. Right now, the federal government's approach is: let's permit the cell phone companies to put up the towers, and we'll worry about human health problems later.

REASONS FOR GRANTING CERTIORARI

Much as *New York v. United States*, this case "implicate[s] one of our Nation's newest problems of public policy and perhaps our oldest question of constitutional law." 505 U.S. at 149. The public policy problem here concerns the health effects of radio frequency emissions from cellular phone facilities. The constitutional question concerns the proper relationship between "the Federal government and the states" *id.* — or, more precisely, state-created local zoning boards. Specifically, the issue is who will be accountable to the electorate for the Federal radio frequency emissions standards: The Federal government itself, which is responsible for setting the standards, or the local zoning boards, which, as demonstrated below, have had the standards thrust upon them. Petitioners submit that while Congress has substantial power to preempt State legislation under the commerce clause, the Tenth Amendment precludes Congress from treating state and local legislative bodies as puppets on a Federal string.

Both the public policy question and the constitutional question are of overriding national importance necessitating review by this Court. Indeed, the gravity of the policy question underscores the great significance of the constitutional question. Since the mid-1990s, there has been a veritable

explosion in the number of telecommunication facilities for wireless phone systems, which customarily consist of a tower, antennas and an equipment box with radios. *See* Foster, Heverty and Pugh, "An Analysis of Facility Siting Issues Under Section 704 of the Telecommunications Act of 1996," 30 *The Urban Lawyer*, 729 (1998).[6]

As a result of such cell tower proliferation, federal standards which govern tower emissions have a critical impact on virtually every community across the country, and the effects of those regulations, for good or ill, reach as far as the radio-emissions themselves that penetrate the very homes of millions of Americans. As noted above, under the Telecommunications Act of 1996, these federal standards are *exclusive* and preempt local health regulation. As the authors of a recent article put it:

> In one fell swoop, Congress removed from control of the local governments one of the biggest issues confronting them in the tower siting arena: local opposition based on fear of cancer or other ill effects from the radio emissions of wireless facilities.

Foster, *et al.*, 30 *Urban Lawyer* at 740, *citing Genessee Tel. Co. v. Szmigel*, 174 Misc.2d 567, 570, n. 3 (Sup. Ct. Monroe Cty, 1997).

It is imperative that such a sweeping exercise of federal power with such far reaching consequences in such a crucial area of public health and safety (1) be made in accordance with constitutional principles, and (2) be subject to the effective scrutiny of the people through the electoral process.

---

[6] As one commentor has noted, "the wireless communication industry in America has consistently grown at a rate that has outpaced the wildest predictions of economists and industry leaders." Note, "Wireless Facilities Are A Towering Problem," 40 *Wm. & Mary L. Rev.*, 975, 979 (1999).

Regrettably, neither is the case here, as further demonstrated below. Rather, this is a case where Congress has violated the Tenth Amendment by compelling state-created entities to "enact and enforce a federal regulatory program," (*New York*, *supra*, 505 U.S. at 151,[7] *quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 288 (1981)), thereby evading Congressional accountability to the public (*New York*, 504 U.S. at 168-69) and "restrict[ing] those political processes which can obviously be expected to bring about the repeal of undesirable legislation. . . ." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.10 (1938).

Petitioners do not ask the Court to act as an ultimate arbiter of whether the federal standards are desirable or undesirable, but only to grant review to determine whether the *manner* in which they have been imposed upon localities is in conformity with the democratic structures of the constitution established by the Framers. *Cf.* Calabresi, "Textualism and the Countermajoritarian Difficulty," 66 *Geo.Wash.L.Rev.* 1373, 1391 (1998) (Supreme Court enforcement of jurisdictional lines of federalism and separation of power is "democracy enhancing" and "has the potential to make our system of Madisonian democracy function better.")

This Court has recently granted certiorari in Tenth Amendment cases where, arguably, the significance of the underlying issues pales in comparison to that presented here. For example, in *Printz*, the federal regulation in question consisted of relatively innocuous, temporary requirements that local chief law enforcement officers perform background checks on would-be purchasers of firearms. 521 U.S. at 903-04. Similarly, in *Reno v. Condon*, the Court granted certiorari to review the Tenth Amendment ramifications of the Driver's

---

[7] The holding in *New York* is fully applicable to *local* subdivisions of states, as this Court made clear in *Printz*, which invalidated legislation impressing local chief law enforcement officers into federal service.

Privacy Protection Act, 528 U.S. ___, 120 S. Ct. 666, 671 (2000). While *Printz* and *Reno* undoubtedly involved important issues, of still greater importance are those presented in the case at bar.

THE 10th AMENDMENT PRESERVES THE SYSTEM OF DUAL SOVEREIGNTY ESTABLISHED BY THE FRAMERS

A recent line of decisions handed down by this Court has breathed new life into the Tenth Amendment. Chief among these are the decisions in *New York v. United States* and *Printz v. United States*. In *New York* and *Printz*, this Court forcefully reconfirmed the long-standing principle that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" 505 U.S. at 161 *quoting Hodel, supra*, 452 U.S. at 288. *See also New York, supra*: "the Constitution has never been understood to confer upon Congress the ability to require states to govern according to Congress' instructions." *citing Coyle v. Smith*, 221 U.S. 559, 565 (1911); *Printz*, 521 U.S. at 925: ". . . the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs."[8]

The historical record conclusively establishes that the Framers "designed a system in which the state and federal governments would exercise concurrent authority over the people — who were, in Hamilton's words, 'the only proper objects of government.'" *Printz*, 521 U.S. at 919-20, *quoting The Federalist No. 15; Accord, Alden, supra*, 527 U.S. at 714.

---

[8] Commandeering the legislative power of the states to serve federal ends is antithetical to the "system of dual sovereignty" established by "the Framers, who explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *Printz*, 521 U.S. at 918, 920, *quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *New York, supra*, 505 U.S. at 166.

Moreover, any act which threatens to "compromise the structural framework of dual sovereignty" is "categorically" unconstitutional and "no comparative assessments of the various interests [involved] can overcome that fundamental defect." *Printz*, 521 U.S. at 932-33.

RESPECTING THE SPIRIT OF DUAL SOVEREIGNTY PRESERVES DEMOCRACY

While the categorical rule may appear doctrinaire and inflexible, it serves vital constitutional purposes, *inter alia*, by preserving the accountability of elected officials to the electorate — the very basis of democratic government. As explained in *New York*:

> . . . where the Federal Government directs the States to regulate, it may be *state officials who will bear the brunt of public disapproval*, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. (505 U.S. at 169) (Emphasis added.)

Accord Petersburg, 205 F.3d at 701. *See also Printz*, observing that where state governments are forced to implement a Federal program, state officials are "put in a position of taking the blame for its burdensomeness and its defects." (521 U.S. at 930, *quoting* Merrit, *Three Faces of Federalism: Finding a Formula for the Future*, 47 Vand. L. Rev. 1563, 1580, n. 65 (1994)).[9]

---

[9] *See also Alden*, 527 U.S. at 715: "When the Federal Government asserts authority over a State's most fundamental political process, it strikes at the heart of the political accountability so essential to our liberty and republican form of government."

ARGUMENT

POINT I

CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE SECOND CIRCUIT ON THE CONSTITUTIONALITY OF SECTION 704 OF TELECOMMUNICATIONS ACT OF 1996

The Fourth Circuit Decision

In *Petersburg*, *supra*, a divided panel of the Fourth Circuit reversed the District Court and upheld a decision of the Board Supervisors of Nottaway County, Virginia denying an application to erect a cellular telephone tower. Applying the federalism principles elucidated above, Fourth Circuit Judge Niemeyer wrote a concurring opinion declaring that Section 704 of the Telecommunications Act "'commandeers' the County's legislative process and is therefore unconstitutional under the Tenth Amendment." 205 F.3d at 705 *quoting New York*, 505 U.S. at 175.

Judge Niemeyer recognized that the functions of the local zoning board were legislative in nature. 205 F.3d at 699. The Telecommunications Act therefore effectively imposes federal standards on this legislative process.

As Judge Niemeyer recognized:

> through a compromise involving a partial preemption approach, [Congress] enacted § 704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of

> telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

(205 F.3d at 705-06)[10]

The Second Circuit Decision

Despite the serious federalism issues raised by the Telecommunications Act, the Second Circuit in this case brushed aside petitioners' constitutional arguments in a single paragraph. *Cellular Phone Task Force*, *supra*, 205 F.3d at 96. (A-21) According to the Circuit Court, Congress did not commandeer local authorities in violation of *Printz* and *New York*, because "[s]tate and local governments are [purportedly] not required to approve or prohibit anything" under the statute. (*Id.*) (A-21) This conclusion is directly contrary to the Second Circuit's own jurisprudence, which demonstrates that local authorities are routinely required to approve tower construction under the Act.

For example, in *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999), the Second Circuit reviewed a decision by a local town board on Long Island to deny permits to construct two wireless communication "cell sites." At public hearings on the applications before the board, the "vast majority" of speakers "expressed concern that the rfes [radio frequency emissions] emitted by the cell sites might

---

[10] By its express terms, Judge Niemeyer's opinion does not deal with subsection (iv) of Section 332(c)(7)(B), which is at issue here. Nonetheless, his reasoning is fully applicable to the case at bar. No less than subsection (iii), subsection (iv) imposes federal standards on local zoning boards and therefore contravenes the Tenth Amendment under the holding espoused by Judge Niemeyer — a holding which is in direct conflict with the decision of the Second Circuit in this case.

cause cancer." (*Id.* at 492.) Finding that the health concerns expressed by residents could not constitute substantial evidence under the Telecommunications Act and that the remaining evidence was insufficient to support the board's decision, the Second Circuit expressly held "that an injunction ordering the Town to issue the permits was an appropriate remedy." (166 F. 3d at 497.) Thus, despite the town board's obvious misgivings about the health effects of the cell sites, it was *compelled* by the Telecommunications Act to exercise its legislative authority in accordance with the mandate of the Federal government, rather than its own policy preferences, and to approve construction. This is precisely the unconstitutional result which the Second Circuit panel in *this* case said would *not* come about under the Act. Clearly, the Second Circuit was wrong and ignored its own prior case law in this field.

Nor is *Oyster Bay* an aberration. The Court explicitly noted that "the majority of district courts which have heard these cases have held that the appropriate remedy is injunctive relief, in the form of an order to issue the relevant permits." (*Id. citing Iowa Wireless Servs., v. City of Moline* 1998 WL 879518 (C.D. Ill.) at *9 (ordering defendant to grant plaintiff a special use permit "with all deliberate speed"); *OmniPoint Corp. v. Zoning Hearing Bd. of Pine Grove, TP*, 20 F. Supp. 2d 875, 881-92 (E.D. Pa. 1998) (ordering zoning board to issue requested special exception permit and declining to remand because to do so would "frustrate the TCA's intent to provide aggrieved parties full relief on an expedited basis"), *aff'd*, 181 F.3d 403 (3rd Cir. 1999); *Illinois RSA No. 3 v. County of Peoria*, 963 F. Supp. 732, 747 (C.D. Ill. 1997) (concluding that injunction directing defendant to issue permit is appropriate relief under TCA); *BellSouth Mobility Inc. v. Gwinnett County Georgia*, 944 F. Supp. 923, 929 (N.D. Ga. 1996) (granting plaintiffs' request for writ of mandamus and ordering defendant to grant plaintiffs' requested permit).

These cases also conclusively refute the Second Circuit's suggestion that Congress was merely exercising its "authority to offer states the choice of regulating the activity according to federal standards or having state-law pre-empted by federal regulation." (205 F.3d at 96, *quoting New York*, 505 U.S. at 167.) (A-21) As *Oyster Bay* and the cases cited therein demonstrate, *there is no choice at all*. If the local authorities fail to follow the federal standards on their own, the federal courts will compel them to do so. *Accord Petersburg*, 205 F.3d at 702.

This conclusion is borne out by the legislative history of Section 704 cited above, which demonstrates that Congress did not leave local governments with a choice, but consciously chose to require them to continue to consider cell tower zoning issues in conformity with *federal* standards.

In addition, Judge Niemeyer recognized that any choice offered to local authorities under the Act is at best a Hobson's choice:

> The choice suggested — that Nottoway County comply with § 704(a) of the Telecommunications Act or end its role as a land-use regulator — is no less coercive than the choice offered the states in *New York*. Indeed, it is not a choice at all. The Telecommunications Act does not suggest it, and it cannot be implied except in an ontological sense: one has a "choice" to avoid obeying a governmental body by ending his own existence. To suggest that a local body withdraw from land-use regulation and leave the construction of structures in the community to the whims of the market is nothing short

> of suggesting that it end its existence in one of its most vital aspects. *Petersburg*, 205 F.3d at 703. (*Id.*) [11]

The concurrence went on to note that "land use decisions are a core function of local government," and described the chaos that would follow should local authorities "abandon their land use power." (*Id.*) Requiring local zoning boards to forego this fundamental power violates the residuary inviolable sovereignty retained by the states. *Alden*, 527 U.S. at 715.

Petitioners respectfully submit that Judge Niemeyer's interpretation is clearly the more persuasive, and that the Second Circuit's reading of the statute disregards its obvious effect. Plainly, to prohibit local authorities from disapproving cell tower construction based on health concerns has exactly the same effect as expressly requiring them to approve such construction.

Finally, the Second Circuit declared that it had "no doubt" that Congress possessed the legislative authority under the Interstate Commerce Clause "to preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure. . . ." (205 F.3d at 96.) Evidently, the Court considered this to be the decisive factor establishing the constitutionality of the Act. However, the conclusion that Congress has legislative jurisdiction under the commerce clause to regulate telecommunications simply does not resolve the constitutionality of the act under the Tenth Amendment. As this Court recently observed:

> In *New York* and *Printz*, we held federal statutes to be unconstitutional not because Congress lacked legislative

---

[11] In *New York*, states were given the coercive "choice" of "either accepting ownership of [radioactive] waste, or regulating according to the instructions of Congress." (505 U.S. at 175.)

> authority over the subject matter, but *because those statutes violated the principles of federalism contained in the Tenth Amendment.*

Reno v. Condon, 120 S. Ct. at 671. (Emphasis added.)

POINT II

THE SECOND CIRCUIT DECISION CONFLICTS WITH RECENT DECISIONS OF THIS COURT PRESERVING THE INVIOLABLE SOVEREIGNTY RETAINED BY THE STATES

The Second Circuit decision conflicts with the Supreme Court's recent decision in *Alden v. Maine*, 527 U.S. at 715, which held that in exercising its enumerated powers, *the Federal Government may not infringe upon the "residuary and inviolable sovereignty" retained by the States* under the Constitution (*quoting The Federalist No. 39* at 245).

As the Court recognized in *Alden*: "the founding document 'specifically recognizes states as sovereign entities.'" (*Id. quoting Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 71 n.15 (1991). Therefore, under the Constitution, "Congress is bound to treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.") *Alden*, 527 U.S. at 749.

An attribute of such inviolable sovereignty is the duty to ensure that citizens are not left unprotected in the face of potentially lethal threats to their lives, health and safety. This is not merely the State's right, it is arguably the most fundamental obligation of government and the cornerstone of the social compact as understood by the Framers themselves.

Relevant historical sources (*cf. Alden*, 527 U.S. at 713, 715-16) confirm that the preservation of life was considered *a paramount duty of government* and one of the key reasons

it exists. No less a personage than John Locke, the esteemed political writer whose thought so influenced the Framers, declared that the "great and chief end . . . of men's uniting into commonwealths, and putting themselves under government" is for "the mutual preservation of their *lives*, liberties and estates." Locke, *Second Treatise of Government*, Sections 123, 124. (Emphasis added.) Speaking through Jefferson, the founding generation incorporated Locke's principle into the Declaration of Independence itself, which declares that securing life was one of the three primary purposes for which "Governments are instituted among men."

So basic is this obligation, plaintiffs submit that it is of equal stature with sovereign immunity from lawsuits, and with those "political functions" which "lie[ ] at the heart of representative government" and are thus "reserved to the states under the Tenth Amendment." *Gregory*, *supra*, 501 U.S. at 463.[12]

The Federal Government may, of course, exercise the power to set public health standards in areas relating to interstate commerce. However, where it has defaulted on its obligation to protect public health, the Federal Government may not simultaneously *prevent the States from taking action to do so*. Such preemption would be irreconcilable with the "dignity and essential attributes inherent in" the State's status as sovereigns. (*Alden*, 527 U.S. at 714) Yet that is precisely what the Telecommunications Act and the FCC regulations

---

[12] In the present day, recent decisions of this Court also confirm that the power to protect the people from threats to health and safety is part of the traditional powers retained by the States. *U.S. v. Morrison*, 529 U.S. ___, 120 S.Ct. 1740 (2000) (confirming that the Founders reposed the plenary police power in the States.) Indeed, this Court has very recently reconfirmed that the field of health care "is a subject of traditional state regulation . . ." *Pegram v. Herdich*, 530 U.S. ___, 120 S. Ct. 2143, 2158 (2000), *quoting New York State Conference of Blue Cross and Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 654-655 (1995).

do, by leaving citizens exposed to the potential health effects of the radio frequency radiation from cellular towers and by simultaneously tying the hands of state and local officials who wish to intercede to protect the well-being of their citizens.

Based on the administrative record before the Second Circuit, it is apparent that the FCC has been hobbled by Congress in its ability to update emissions standards and to take meaningful regulatory steps to safeguard the public. As the scientific literature amply demonstrates, the level of Federal research on this issue by EPA is wholly inadequate to this day, at a time when findings by researchers around the world demonstrate the pressing need for a heavily-funded federal human health-oriented research program.[13]

The power and responsibility to protect public health and safety cannot lapse. When the Federal Government fails to exercise it, the power necessarily reverts to the people of the States as part of their inviolable sovereignty. This principle is also enshrined in the Declaration, wherein one of the chief complaints against the British Crown is that the king impeded

---

[13] For example, an 18-year study by Dr. Bruce Hocking in Sydney, Australia found that children living close to broadcast towers for four TV stations and an FM radio station suffered twice as many deaths from leukemia as children residing farther away. The radiation levels were no more than 8 microwatts per square centimeter, 125 times lower than the 1996 FCC standards. (Hocking B, Gordon IR, Grain HL, Hatfield GE, *Cancer Incidence and Mortality and Proximity to TV Towers. Med J Aust* 165(11-12):601-605, 1996.)

Adult leukemias were nine times higher than expected within the first half kilometer of a BBC TV and FM transmitter in Sutton Coldfield near Birmingham, England. Dr. Helen Dolk and associates observed that the leukemia incidence was almost double expected levels within two kilometers. The maximum radiation level measured was only 5.7 microwatts per square centimeter. (Helen Dolk, *et al. Cancer Incidence Near Radio and Television Transmitters in Great Britain. American Journal of Epidemiology*, Vol. 145, No. 1 (January 1997) pp. 1-9.)

the passage of "laws most wholesome and necessary to the public good" by "refusing his assent" and by "dissolving colonial legislatures":

> whereby the Legislative Powers, incapable of annihilation . . . returned to the People at large for their exercise. . . .

The provision of the Telecommunications Act forbidding States from filling the regulatory vacuum left by Congress and the FCC is therefore repugnant to the Tenth Amendment and basic principles of American democracy.

Congress Has Failed to Fund EPA Research Into Biological Effects of RF Emissions on Human Health

The real problem here is that the most recent FCC standards set in 1996, are still based on thermal effects, despite newer information coming from scientific sectors largely outside of the U.S. The current FCC standards were adopted from decades-old research reviewed by the National Council on Radiation Protection (*NCRP Report No. 86*, issued April 2, 1986), and from the American National Standards Institute (*EEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3kHz to 300 GHz*, approved Sept. 26, 1991, with a cut-off date for scientific papers of December, 1985). Both Professional agencies have a 5-to-7 year built-in time lag in their review process, and their respective RF committees are comprised almost entirely of physicists, engineers and bioelectromagnetics researchers — not professionals from the public health sector. In other words, dated, inappropriate research, reviewed by authorities from inappropriate professions, is being used to reach conclusions about public safety concerning radio frequency radiation. Why has there been no better updating of the FCC standards? The answer is obvious: because

Congress has not appropriated adequate funds to conduct non-thermal research by the key federal agency — EPA.

The Court of Appeals premised its refusal to disturb the FCC regulations in large part on the Court's confidence in the Environmental Protection Agency (EPA) keeping the FCC informed on new developments which would require changes in the FCC's existing maximum emissions standards. As the Court of Appeals said:

> Moreover, it was not arbitrary and capricious for the FCC to conclude that it need not supply the new evidence to the other federal agencies with expertise in the area. It could reasonably expect those agencies to keep abreast of scientific developments in carrying out their missions. For instance, the EPA had participated not only in the hearings and comments leading to the promulgation of the Guidelines, but also had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. *It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970. See* 42 U.S.C. § 2021(h).

(205 F.3d at 91) (A-10) (Emphasis added.)

The Court's reliance on the EPA was technically correct but substantively naive. What the Court did not realize was that *Congress terminated funding for radiation research by EPA* in 1996, and no staff has been available at EPA to conduct such research for the past five years.

This Court can properly take judicial notice of the federal budget levels for this agency. Reproduced on the following page is a "Summary of EPA Budget and Staffing for RF Radiation Activities from FY 1990-2000" recently supplied

Summary of EPA Budget and Staffing for RF Radiation Activities from FY1990–2000

(Extramural Dollars Only)

FY	90	91	92	93	94	95	96	97	98	99	00
FTE	2.3	2.2	2.1	2.1	2	2	0.5	0.5	0.5	0.5	0.5
$(K)	$0	$40	$25	$543[a]	$73[b]	$140[c]	$0	$0	$25[d]	$0	$0

[a] Includes grant funds ($510,000) under EPA/NIEHS Interagency Agreement DW75935939.

[b] Includes funds ($50,000) for Cooperative Agreement (CX823714) with the National Council on Radiation Protection and Measurements (NCRP).

[c] Includes funds ($50,000) for Cooperative Agreement (CX823714) with NCRP.

[d] $25K completes total funding ($125,000) for Cooperative Agreement (CX823714) with NCRP.

by the agency in response to a request from Senator Joseph I. Lieberman of Connecticut. It will be seen that only one-half of a staff member is presently assigned to perform EPA's "lead role" in RF radiation health effects, and such has been the case since 1995. It will also be seen that *total* research expenditures in the five years since 1995 amount to a final payment of *$25,000* on a cooperative agreement entered into with NCRP in 1994. Nothing more. In contrast, the EPA research expenditures from 1990 through 1995 totaled *$821,000*. While the Court of Appeals was theoretically correct in its reliance on EPA's lead research responsibility, in practical terms the Court was dead wrong. There is *no* Congressionally funded research into the biological effects of cellular tower RF emissions in the agency to which Congress assigned the "lead role" in 1970.

This is a perfect example of lack of accountability. Citizens should be allowed to decide whether inaction by their own elected Congressional delegations is the result of large campaign contributions and intense lobbying from the telecommunications industry.[14]

---

[14] The Court can take judicial notice of the official reports filed with the Federal Elections Commission (FEC), summarized on the Internet website of the Center for Responsive Politics (CRP) (website: www.crp.org). At the time the Telecommunications Act of 1996 was under discussion in 1994-95, political action committees for local and long distance phone companies contributed over $4 million to key members of Congress (data from CRP reported in *USA Today* issue of October 16, 1995).

During the period of actual passage of the Act, FEC filings, together with lobbying reports filed with the House and Senate, showed substantially greater expenditures for 1996-97, amounting to a grand total of $29,425,097.

For the current Congress, campaign contributions from telephone utilities reported to the FEC (as of August 30, 2000, even before the start of final election campaigning): $5,503,169.

These financial pressures on key Congressional committee members may — or may not — explain the failure of Congress to fund ongoing research into the potential hazards to human health resulting from the FCC's maximum RF emissions standards for wireless telecommunications facilities. But the stark fact remains that *no such federally-funded research is being conducted by EPA*, and the main premise of the Court of Appeals decision was in error.

That may please the telecommunications business interests, but is it a responsible approach to federalism? We say it is not what the Framers of the Constitution intended, and the preemption provisions in the Act should be declared unconstitutional.

CONCLUSION

The Petition for Certiorari should be granted.

Dated: New York, New York
September 7, 2000

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001
(212) 629-0590

* *Counsel of Record*

APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC., ELECTROMAGNETIC ENERGY ASSOCIATION, and AT&T WIRELESS SERVICES, INC.,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Nos. 97-4328(L); 98-4003(Con); 98-4005(Con); 98-4025(Con); 98-4122(Con).

Argued April 5, 1999
Decided Feb. 18, 2000

James R. Hobson, Esq., Donelan, Cleary, Wood & Maser, P.C., Washington, DC, (Mark F. Wilson, Esq., The Communications Workers of America, Washington, DC, *on the brief*), for *Ad-Hoc* Association, The Communications Workers of America, AFL-CIO, CLC and CWA Local 7810, *Petitioners*.

John E. Schulz, Esq., San Rafael, CA, for Cellular Phone Taskforce, *Petitioners*, Joel Marcus, Counsel, Federal Communications Commission, Washington, DC, (Joel I. Klein,

Assistant Attorney General, Catherine G. O'Sullivan, Andrea Limmer, United States Attorneys, Christopher J. Wright, General Counsel, Daniel M. Armstrong, Associate General Counsel, C. Grey Pash, Jr., Counsel for the FCC, Washington, DC, *on the brief*), *for Respondents*.

Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Washington, DC, (Bruce D. Sokler, Esq., Sara F. Seidman, Michelle M. Mundt, *on the brief*; Douglas I. Brandon, Esq., AT&T Wireless Services, Inc., Michael F. Altschul, Cellular Telecommunications Industry Association, Washington, DC), for AT&T Wireless Services, Inc., and Cellular Telecommunications Industry Association, *Intervenors*,

John I. Stewart, Jr., Esq. and William D. Wallace, Esq., Crowell & Moring, LLP, Washington, D.C., submitted a brief for Electromagnetic Energy Association, National Association of Broadcasters, and Association for Maximum Service Television, Inc., *Intervenors*,

Peter James Clines, Esq., New York, NY, submitted a brief for Gabriel Seymour, First Selectman, Town of Canaan, Connecticut, *et al.*, *Amici Curiae on behalf of Petitioners*.

Before: WALKER, NEWMAN, and SACK,

Circuit Judges.

JOHN M. WALKER, *Circuit Judge*:

Petitioners Cellular Phone Taskforce ("CPT") and *Ad-Hoc* Association of Parties Concerned About the Federal Communications Commission Radio Frequency Health and Safety Rules ("AHA"), joined by numerous other individuals and groups, appeal from two final opinions and orders in which the Federal Communications Commission (the "FCC") promulgated guidelines for health and safety standards of radio

frequency ("RF") radiation, established streamlined procedures for meeting requirements under the National Environmental Policy Act for FCC licensees that are in compliance with the guidelines, and retained the exclusive ability to regulate the relevant radio facility operations. *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 11 F.C.C. Rcd. 15123, 1996 WL 926565 (1996) ("First Order"); Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934, 12 F.C.C. Rcd. 13494, 1997 WL 522796 (1997) ("Second Order").

AFFIRMED.

BACKGROUND

In 1985, after seeking consensus among participating experts and after public notice and comment, the FCC adopted guidelines for human exposure to RF radiation from FCC-regulated transmitters and facilities. The guidelines were required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and the Council on Environmental Quality ("CEQ") regulations promulgated thereunder, *see* 40 C.F.R. §§ 1500.1 *et seq.* In promulgating its rules, the FCC adopted the guidelines issued in 1982 by the American National Standards Institute ("ANSI"), a recognized standard-setting organization. *See* Biological Effects of Radiofrequency Radiation, 100 F.C.C.2d 543, 1985 WL 260091 (1985).

In November 1992, ANSI issued a more restrictive health standard for RF exposure[1] than its 1982 standard. The new ANSI standard prompted the FCC to propose updating its

[1] This standard was originally developed by the Institute of Electrical and Electronic Engineering ("IEEE"), and a subgroup within the IEEE monitors the continued validity of the standard. For convenience, we will not discuss how the responsibilities are divided between ANSI and IEEE, but refer to both as ANSI throughout this opinion.

existing guidelines. *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, 8 F.C.C. Rcd. 2849, 1993 WL 757412 (1993). In the 1993 proposal that was sent out for notice and comment, the FCC noted that the 1992 ANSI standard was less restrictive than two other standards: those issued by the congressionally chartered National Council on Radiation Protection and Measurements ("NCRP"), and those proposed by the International Radiation Protection Association.

During the comment period, the FCC received submissions from, *inter alia*, the Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the Occupational Safety and Health Administration ("OSHA"), and the National Institute for Occupational Safety and Health ("NIOSH"). Ultimately, the FCC adopted guidelines that combined the NCRP standard with the ANSI standard (the "Guidelines"). These Guidelines — part of the First Order that petitioners challenge in this case — mostly incorporate the maximum permitted exposure ("MPE") limits suggested by the NCRP, together with certain other features of the ANSI standard. In particular, the FCC accepted ANSI's suggestion to exempt certain classes of facilities from having to file routine Environmental Assessments ("EAs") setting forth their compliance with the MPE limits in the Guidelines. The exempt category consists of tower-mounted telecommunications antennae 10 meters or higher above ground and rooftop antennae emitting less than 1000 watts of power. The FCC elected to exempt such facilities after determining that they pose no risk of exposing humans to RF radiation in excess of MPE levels.

Several parties filed petitions for reconsideration of the FCC's First Order. Some sought slightly stricter standards, and others sought to persuade the FCC to adopt the more restrictive ANSI standard wholesale. The FCC granted the petition for rehearing but declined to adopt an unmodified

ANSI standard or to tighten its own guidelines, except in minor respects.

While the FCC was considering the proposed guidelines, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (the "Act"), several provisions of which affected the FCC's ongoing proceedings. In particular, the Act preempted state and local governments from regulating the placement, construction or modification of personal wireless service facilities on the basis of the health effects of RF radiation where the facilities would operate within levels determined by the FCC to be safe. *See* 47 U.S.C. § 332(c)(7)(B)(iv). In the Second Order that is at issue in this case, the FCC announced, *inter alia*, a rule that prohibited state and local governments from regulating any personal wireless service facilities based upon perceived health risks posed by RF emissions as long as the facilities conformed to the FCC Guidelines regarding such emissions.

Petitioners' appeal raises a plethora of claims that can be grouped into five categories: Petitioner Cellular Phone Taskforce ("CPT") argues (1) that the Guidelines violate the Americans with Disabilities Act and the Rehabilitation Act; and both petitioners argue that (2) the FCC was arbitrary and capricious in enacting the Guidelines in violation of the Administrative Procedure Act, specifically 5 U.S.C. § 706(2)(A); (3) the FCC violated NEPA by failing to prepare an environmental impact statement; (4) the FCC exceeded its powers when it prohibited state and local governments from regulating the operation of personal wireless service facilities that conformed to the FCC's RF standards; and (5) the same prohibition, found at 47 U.S.C. § 332(c)(7)(B)(iv), is unconstitutional both on its face and as applied. We will consider each group of claims in turn.

DISCUSSION

I. *Americans With Disabilities Act and Rehabilitation Act Claims*

Petitioner CPT's claims that the Guidelines violate the Americans with Disabilities Act ("ADA"), *see* 42 U.S.C. § 12101 *et seq.*, and Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, were not the subject of a final order by the FCC. While they were raised before a staff member, the Chief of the Office of Engineering and Technology, they were not presented to the Commission. Decisions of agency staff are not directly appealable final orders. Our review is limited to final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(a). *See American Broad. Cos. v. FCC*, 682 F.2d 25, 30 (2d Cir. 1982); *see also* 47 U.S.C. § 155(c)(7) ("The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection."); *International Telecard Assoc. v. FCC*, 166 F.3d 387, 387-88 (D.C. Cir. 1999) (per curiam).

While we have said that the foregoing exhaustion requirement is not inflexible, we generally do not permit petitioners to raise an issue for the first time on appeal without giving the Commission an opportunity to address it, particularly where the issue is a novel one. *See National Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986). The novelty of the claim raised here, that the Guidelines impermissibly discriminate against handicapped persons in violation of the ADA and the Rehabilitation Act, makes initial Commission determination both necessary and appropriate. We therefore dismiss that part of the appeal relating to petitioner CPT's ADA and Rehabilitation Act claims.

The remaining claims were the subject of a final order by the Commission and thus are properly before us.

II. *The Administrative Procedure Act Claims*

Petitioners claim that the FCC in adopting the Guidelines violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq.*, when it arbitrarily and capriciously (1) failed adequately to consider the evidence of harmful effects from non-thermal levels of radiation; (2) ignored expert recommendations that would restrict the regulatory regime; (3) ignored critical factors bearing upon MPE levels; and (4) failed to account for the cumulative effects of radiation in creating categorical exemptions for certain facilities from routine environmental assessment. We disagree.

We may reverse an agency decision and informal rulemaking only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see, e.g., National Black Media Coalition v. FCC*, 822 F.2d 277, 280 (2d Cir. 1987). An agency's factual findings must be supported by substantial evidence which "has been construed to mean less than a preponderance, but more than a scintilla." *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (internal quotation marks omitted). "The reviewing court must take into account contradictory evidence in the record, but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490, 523, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (internal citations and quotation marks omitted). When an agency makes a decision in the face of disputed technical facts, "[a] court must be reluctant to reverse results supported by . . . a weight of considered and carefully articulated expert opinion." *Federal Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453,

463, 92 S.Ct. 637, 30 L.Ed.2d 600 (1972). In evaluating agency reasoning, we must be satisfied that the agency examined the relevant data and established a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (internal quotation marks omitted). The agency's action should only be set aside where it

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the products of expertise.

Id. With these general principles in mind, we turn to petitioners' specific claims under the APA.

A. *Non-Thermal Effects of Radiation*

The parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the Guidelines are premised on such effects. Petitioners claim that the Guidelines are arbitrary and capricious because they fail to account for *non-thermal* effects of RF radiation. In support of their claim, petitioners argue that (1) neither the ANSI nor the NCRP sufficiently considered evidence of non-thermal effects and it was therefore arbitrary and capricious for the FCC to rely on the ANSI and NCRP standards; (2) the FCC did not fulfill its duty independently to evaluate new evidence filed during the reconsideration round; (3) the FCC failed to elicit expert testimony during the reconsideration round; and (4) the FCC's decision not to lower the MPE levels below the maximum permitted thermal levels failed to account for the scientific uncertainty surrounding RF harm. These arguments are unavailing.

In basing its guidelines on a combination of the ANSI and the NCRP standards, the FCC stated that:

> [The] guidelines are based on recommendations of expert organizations and federal agencies with responsibilities for health and safety. It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and th[en] adopt stricter standards than those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be "hypersensitive" or "electrosensitive."

Second Order, 12 F.C.C. Rcd. 13494 at ¶ 31, 1997 WL 522796. This decision was not arbitrary and capricious. In promulgating their standards, both the ANSI and the NCRP considered non-thermal effects. The ANSI found that "no reliable scientific data exist indicating that [n]onthermal . . . exposure may be meaningfully related to human health" and concluded that its exposure standard "should be safe for all." The NCRP found that the existence of non-thermal effects "is clouded by a host of conflicting reports and opinions." In the face of conflicting evidence at the frontiers of science, courts' deference to expert determinations should be at its greatest. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). All of the expert agencies consulted were aware of the FCC's reliance on the ANSI and NCRP standards. Each had been advised of such evidence of non-thermal health effects as may have existed and still found the FCC's approach to be satisfactory.

Under those circumstances it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific

understanding underlying the ANSI and NCRP standards was no longer valid. At most, the newly submitted evidence established that the existence of non-thermal effects is "controversial," and that room for disagreement exists among experts in the field. After examining the evidence, the FCC was justified in continuing to rely on the ANSI and NCRP standards.

Furthermore, the FCC satisfied itself that there was a mechanism in place for accommodating changes in scientific knowledge. It found that both the ANSI and the NCRP had "committees that are working on revisions of their respective exposure guidelines," and that "ongoing research in a number of areas may ultimately result in changes in the fundamental understandings upon which [the ANSI] and the NCRP [standards] are based," and that it would "consider amending [its] rules at any appropriate time if these groups conclude that such action is desirable." Because the new evidence consisted of publicly available scientific papers, the FCC could reasonably expect it to be considered by the ANSI and the NCRP standing committees that were working on revising their standards.

Moreover, it was not arbitrary and capricious for the FCC to conclude that it need not supply the new evidence to the other federal agencies with expertise in the area. It could reasonably expect those agencies to keep abreast of scientific developments in carrying out their missions. For instance, the EPA had participated not only in the hearings and comments leading to the promulgation of the Guidelines, but also had been on the verge of releasing its own draft guidelines pertaining to the health effects of RF radiation in 1996. It was fully reasonable for the FCC to expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration, particularly because the EPA had been assigned the lead role in RF radiation health effects since 1970. *See* 42 U.S.C. § 2021(h). Because the newly submitted material consisted of publicly available

scientific articles of the type monitored by the EPA and other agencies and such material was insufficient to invalidate the assumptions underlying the Guidelines, it was not arbitrary and capricious for the FCC to conclude that further consultation with the expert agencies was unnecessary.

Petitioners criticize the FCC for not adopting the NCRP's recommendations for stricter standards in situations of exposure to deep modulated extremely low frequency ("ELF") carrying waves. The NCRP had recommended that the exposure criteria in such situations be the same for occupational exposures as for the general population in order to provide for an additional safety margin. It was not arbitrary and capricious for the FCC to reject the NCRP recommendation. The scientific data were inconclusive on the dangers presented by such radiation, and thus did not mandate a determination different from that reached by the FCC. The NCRP itself had concluded that the existence of modulation effects was unclear. The EPA had recommended that "[w]hile studies continue to be published describing biological responses to non-thermal ELF-modulated RF radiation, the effects information is not yet sufficient to be used as a basis for exposure criteria to protect the public against adverse human health effects." ANSI had likewise found that "no reliable scientific data exist indicating that . . . modulation-specific [disease-related conditions] of exposure may be meaningfully related to human health."

Also unavailing is petitioners' argument that the FCC is required to apply the principle against uncertainties as adopted by the Nuclear Regulatory Commission to limit radiation to levels "as low as is reasonably achievable." *See, e.g., Nuclear Regulatory Commission*, 10 C.F.R. §§ 20.1003, 20.1101(b), (d); *Department of Energy*, 10 C.F.R. § 835.2(a)(2).

The argument that the FCC should create greater safety margins in its guidelines to account for uncertain data is a

policy question, not a legal one. As a policy matter, an agency confronted with scientific uncertainty has some leeway to resolve that uncertainty by means of more regulation or less. *Compare, e.g., American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 528, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) (approving more stringent regulation when agency "could not obtain the more detailed confidential industry data it thought essential to further precision"), with, *e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) ("[A]n agency reasonably may decline to issue a safety standard if it is uncertain about its efficacy"). *See also Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 316 (D.C. Cir. 1992). The FCC concluded that requiring exposure to be kept as low as reasonably achievable in the face of scientific uncertainty would be inconsistent with its mandate to "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." This policy conclusion is neither irrational, arbitrary nor capricious and we decline to disturb it.

B. *Other Expert Recommendations*

Petitioners argue that the Commission arbitrarily ignored or failed to follow expert recommendations that would tighten the standard. Specifically they fault the FCC for (1) adopting a two-tiered MPE level system allowing for higher exposure in "occupational/controlled" situations than in "general population/uncontrolled" situations despite expressions of concern with these definitions by EPA, NIOSH and OSHA; (2) refusing to adopt ANSI's recommendations on induced and contact currents; (3) ignoring the FDA's request that the FCC consider interference with medical devices; and (4) rejecting NISOH's objection to undocumented self-certification of compliance by license applicants. We disagree.

The record shows that the FCC did not ignore any of these substantial comments, but instead provided a reasoned response to each. The FCC found that applying the general-population limits to all situations "would impose significant and unnecessary economic and technical burdens for which adequate justification has not been presented." The FCC elected instead to clarify the differentiation between occupational and general population circumstances. It was not arbitrary and capricious to do so.

With respect to induced contact currents, the FCC concluded that "[b]ecause of the many possible types and configurations of metallic objects that may be near a transmitter," it would be impracticable to demonstrate compliance. And "in view of the continuing questions and difficulties relating to evaluation of induced and contact currents, especially with regard to measurements. . . . we see no practical way to require compliance" with any limits suggested by the parties. However, the FCC "recognize[d] the desirability for limits to be adopted in the future," and promised to "monitor the issues raised . . . [and] revisit this issue" as measuring technology improves. An agency is permitted to consider costs and benefits as well as enforcement issues when establishing rules and regulations. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 54, 103 S.Ct. 2856. The FCC reached a reasoned conclusion to a difficult problem, and was not arbitrary or capricious.

The FCC also did not ignore the FDA's request for rules dealing with interference with medical devices. The object of the rulemaking was to address biological effects of RF radiation. The FDA acknowledged that interference with medical devices was outside the scope of current rulemaking by "encourag[ing]" the FCC "to continue to work with [the FDA] to address separately this issue." The FCC was justified in limiting its current rules in this way because "agencies . . . need not deal in one fell swoop with the entire breadth of a novel development; instead, reform may take place one step

at a time, addressing itself to the phase of the problem which seems most acute to the regulatory mind." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (quotation marks, citation and alteration omitted).

As for NIOSH's objections to undocumented self-certification of compliance, it was entirely within the FCC's discretion not to require operators to submit the type of information that would be provided in an EA. *Cf. Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411-12 (D.C. Cir. 1983) (permitting the FCC discretion to determine what information to request in renewal applications for a broadcast license). "Ample sanctions exist for false statements . . . and licensees are well aware of their duty . . . to be scrupulous in providing complete and meaningful information." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 635 (D.C. Cir. 1978) (quotation marks and citation omitted). The FCC's conclusion that its existing rules concerning licensee certification "have worked adequately in the past and should be continued" was therefore not arbitrary and capricious.

C. *Maximum Permitted Exposure Levels*

In addition to arguing that the MPE levels do not account for non-thermal effects, petitioners argue that the MPE levels are arbitrary and capricious because (1) the exposure levels to hands and wrists were increased without explanation; (2) in setting the MPE level for the general public at one-fifth of the occupational MPE level, the NCRP did not consider individual vulnerabilities among members of the public; and (3) the key assumption pertaining to average exposure time used in establishing the occupational MPEs was fatally flawed because experts within the ANSI standard-setting body disagreed on its validity. These are unavailing arguments.

The increased exposure levels to hands and feet were, in fact, explained by the ANSI: "Considerations that mitigate

these higher permitted local [MPE levels] include relatively high surface-to-volume ratios for these parts of the body, the common experience of relatively large temperature excursions of these parts that normally occur without apparent adverse effects, and the lack of critical function when compared to vital organs."

In establishing the general population MPE level, the NCRP based the lowered MPE level, and thus the increased safety-margin above and beyond the occupational level, on the differences between the two groups. It pointed to the presence among the public of "debilitated or otherwise potentially vulnerable individuals for whom there is presently inadequate knowledge to set firm standards," and the greater risk of harm to the general population due to its higher numbers. The one-fifth level was considered adequate to accommodate these factors, and petitioners have presented no evidence that would render the NCRP's conclusion arbitrary and capricious.

Finally, petitioners challenge the FCC's reliance on experts' divergent assumptions regarding average exposure time. As long as all of the evidence has been considered, as was the case here, a factual finding that is supported by more than a scintilla of evidence is not arbitrary and capricious simply because there is conflicting evidence. *See American Textile Mfr. Inst.*, 452 U.S. at 523, 101 S.Ct. 2478.

D. *Categorical Exclusions*

The Commission concluded that tower-mounted antennae placed more than 10 meters above ground and rooftop antennae transmitting at less than 1000 watts would "offer little or no potential for exposure in excess of the specified guidelines" and that it would not be cost-effective to require routine environmental evaluation of such facilities. First Order, 11 F.C.C. Rcd. 15123, at ¶ 86, 1996 WL 926565. Petitioners argue that these categorical exemptions from having to file

routine EAs are arbitrary and capricious because (1) there may be situations where radiation from such facilities can lead to overexposure behind walls in nearby buildings; and (2) the categorical exemptions ignore constructive interference stemming from multiple antennas or reflections from conductive surfaces, creating "hot spots" where RF radiation levels exceed MPE levels. Missing from the exemption rules, petitioners argue, are rules for when an owner must consider other nearby sources of radiation and rules establishing a public database to facilitate public monitoring. We disagree.

In establishing the categorical exemptions, the Commission conducted a worst-case analysis that considered the effects of multiple antennas mounted on a single tower, and determined that radiation levels in publicly available areas will be many times below MPE levels. The Commission also ensured that combined exposure from multiple towers would be considered by license applicants by charging them with the responsibility of ensuring that their facilities would comply with the MPE rules anywhere their emissions are at least 5% of MPE levels. The FCC's approach was rational. Agencies are permitted to promulgate rules based on cost/benefit analysis. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 54, 103 S.Ct. 2856. In light of the low probability of excluded facilities violating MPE levels, it was reasonable to conclude that there was no need for increased compliance monitoring devices such as a central database. Moreover, the licensees are still responsible for compliance, and an interested person can petition the FCC for review of a site believed to violate the MPE levels. *See* 47 C.F.R. § 1.1307(c).

III. *The NEPA Claims*

Both the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, and regulations promulgated thereunder by the Council on Environmental Quality ("CEQ"), generally require agencies subject to NEPA that are about to commit

resources in a federally significant action, including rulemaking, to consider the environmental effects of their actions by preparing either an Environmental Impact Statement ("EIS"), or an Environmental Assessment ("EA") followed by a finding of no significant impact ("FONSI") or an EIS as appropriate. *See City of New York v. Slater*, 145 F.3d 568, 571 (2d Cir. 1998) (per curiam). In promulgating its standards, the FCC admittedly did not complete either a formal EIS or an EA. Petitioners argue that the FCC was required to prepare an EIS in conjunction with its rulemaking. We disagree.

"[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

The procedures followed by the FCC in the instant rulemaking satisfy the functional compliance test. In considering the environmental impact of its guidelines, the FCC "consult[ed] with and obtain[ed] the comments of any Federal agency which has jurisdiction by law or special expertise with respect to [the] environmental impact involved." 42 U.S.C. § 4332. Both the FCC's First Order and Second Order functionally satisfy the CEQ's requirements for an EA[2] and

---

[2] *"Environmental Assessment"*:

> (a) Means a concise public document for which a federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the

a FONSI[3] both in form and substance. The FCC considered the environmental impact of its rulemaking, including cumulative effects of radiation from multiple towers. And as discussed above, the findings that radiation at MPE levels would be safe and that some RF facilities could be categorically excluded from routine evaluation (findings akin to a FONSI) were not arbitrary or capricious. Thus, no EIS was required. *See Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1556 (2d Cir. 1992).

We also reject petitioners' argument that by not considering RF interference with medical devices, the FCC has failed to take the required hard look at the environmental consequences of its actions in violation of NEPA. NEPA only requires agencies to consider environmental effects, *i.e.*, alterations to the environment that have a proximate effect on human health. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983) (psychological harm resulting from fear that relatives may be subjected to radiation too removed to be environmental harm). Assuming *arguendo* that RF radiation may in certain circumstances interfere with some medical devices in such a way that human health is proximately affected,

---

> environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

40 C.F.R. § 1508.9.

[3] *"Finding of No Significant Impact"* means a document by

> a Federal agency briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it.

40 C.F.R. § 1508.13.

thereby rendering interference with medical devices a cognizable environmental harm, the FCC still was not required to consider those environmental effects at this time. Only when individual RF facilities are constructed and operated will the circumstances arise with sufficient specificity to permit meaningful evaluation. As long as all the significant potential environmental impacts are considered in a combination of general and site-specific assessments at the time the facilities are constructed, the requirements of NEPA and the CEQ have been satisfied. *Cf. Environmental Coalition of Ojai v. Brown*, 72 F.3d 1411, 1418 (9th Cir. 1995) (government preparing site-specific EAs did not have to revisit health effects of RF radiation from radar installation considered on a programmatic level).

IV. *The FCC's Preemption of Certain State Regulation*

As noted earlier, while the rulemaking process was underway, Congress passed the Telecommunications Act of 1996, providing, *inter alia*, that

> No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7)(B)(iv).

The FCC, as part of its rulemaking, issued a comparable interpretive ruling preempting state and local governments from regulating, based on RF emissions, the operation of personal wireless service facilities that are in compliance with the FCC regulations concerning such emissions. Petitioners claim that the FCC's interpretation is contrary to plain congressional intent. In support of their argument, petitioners point to the deliberate absence of the word "operation" from

the statutory language as evidenced by earlier drafts containing the word.

It is now "well settled that we review deferentially an agency's construction of the statute that it is charged with administering." *Linea Area Nacional de Chile S.A. v. Meissner*, 65 F.3d 1034, 1039 (2d Cir. 1995) (*citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n. 11, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). We must defer to an agency's reasonable interpretation where the statute is silent or ambiguous with respect to a particular issue. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778; *Fulani v. FCC*, 49 F.3d 904, 910 (2d Cir. 1995). However, "[i]f the statutory language is clear, both the agency and the court must defer to Congress's intent." *Linea Area Nacional*, 65 F.3d at 1039; *see Chevron*, 467 U.S. at 842, 104 S.Ct. 2778.

The FCC has broad preemption authority under the Telecommunications Act. *See City of New York v. FCC*, 486 U.S. 57, 63-64, 108 S.Ct. 1637, 100 L.Ed.2d 48 (1988); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698-700, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Congress has circumscribed this authority somewhat, removing from the FCC the power to "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the *placement, construction and modification* of personal wireless service facilities." 47 U.S.C. § 332(c)(7)(A) (emphasis added). States and local governments, therefore, retain these powers subject to explicit limitations described in subsection (B). Appellants argue that the absence of the word "operation" from subsection (B)(iv) preserves for the states the right to regulate *operations* of wireless service facilities as well. Subsection (A) does not, however, preserve their authority to regulate such facilities' operations. Therefore, the absence of the word "operation" from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power.

Section 332(c)(7)(B)(iv) does not amount to clear congressional intent to permit state and local governments to regulate the operation of such facilities. The FCC's interpretation is therefore entitled to deference and, because the FCC's interpretation is reasonable, we are bound to accept it.

V. *Constitutional Challenges*

Finally, we reject petitioners' argument that 47 U.S.C. § 332(c)(7)(B)(iv) facially and as applied violates the Tenth Amendment. The statute does not commandeer local authorities to administer a federal program in violation of the federalism principles embodied in the Tenth Amendment and set forth in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) and *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation. "[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York*, 505 U.S at 167, 112 S.Ct. 2408; *see City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). We have no doubt that Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities. *See City of New York*, 486 U.S. at 63-64, 108 S.Ct. 1637; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. at 698-700, 104 S.Ct. 2694. The statute therefore does not violate the Tenth Amendment either facially or as applied. We have considered petitioners' remaining constitutional arguments and find them to be without merit.

Conclusion

The FCC orders are affirmed with costs to be borne by petitioners.

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC., ELECTROMAGNETIC ENERGY ASSOCIATION, and AT&T WIRELESS SERVICES, INC.,

Intervenors,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

Docket Nos. 97-4328(L), 98-4003(Con), 98-4005(Con), 98-4025(Con), 98-4122(Con).

Argued April 5, 1999

Decided Feb. 18, 2000
Petition for Rehearing Filed April 3, 2000
Decided June 6, 2000

Associations challenged two final opinions and orders in which Federal Communications Commission (FCC) promulgated guidelines for health and safety standards of radio frequency (RF) radiation, established streamlined procedures for meeting requirements under National Environmental Policy Act (NEPA) for FCC licensees that complied with guidelines, and retained exclusive ability to regulate relevant radio

facility operations. The Court of Appeals, 205 F.3d 82, affirmed. On petition for rehearing, the Court of Appeals held that: (1) FCC was not liable under Title II of Americans with Disabilities Act (ADA), and (2) complaint did not state Rehabilitation Act claim.

Petition denied.

Edward J. Collins, Cambridge, Massachusetts, *petitioner*.

Before: NEWMAN, WALKER, and SACK, *Circuit Judges*.

ON PETITION FOR REHEARING

PER CURIAM:

Petitioner Cellular Phone Taskforce ("CPT") has petitioned for rehearing to reconsider our decision in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000). We assume familiarity with our earlier decision.

CPT requests, *inter alia*, that we reconsider our determination that CPT's claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* were not properly before us. In response to our decision that an FCC staff member's ruling on these claims was not an appealable final order of the FCC, CPT argues that the FCC did not issue a final order only because it impermissibly delegated its final decision to an agency staff member. We express no view as to the FCC's delegation of decisionmaking but, on reconsideration, agree that on the facts of this case CPT had done all it reasonably could to secure a final agency determination. Considering the discretion we have to review non-final agency determinations, *see National Black Media Coalition v. FCC*, 791 F.2d 1016, 1021 (2d Cir. 1986), we have chosen to consider the merits of CPT's claims.

(1) CPT filed suit under Title II of the ADA, alleging that the FCC had forced states and local governments to discriminate against electrically sensitive people in violation of the ADA. *See* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in . . . the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity"). CPT's claim fails, however, because Title II of the ADA is not applicable to the federal government. *See* 42 U.S.C. § 12131(1) ("The term 'public entity' means . . . any State or local government" or "any department, agency, special purpose district, or other instrumentality" thereof). Regardless of how the actions of state and local governments may or may not be affected by the FCC's challenged guidelines, the FCC itself cannot be made liable under Title II of the ADA.

(2) CPT's claim under the Rehabilitation Act is also unavailing. CPT argues that the FCC's guidelines violate the Rehabilitation Act by permitting the proliferation of FCC-regulated radio frequency ("RF") transmitters. This misconstrues the scope of the Rehabilitation Act's protections. In this context, the Rehabilitation Act applies only to the discriminatory denial of the benefits of a "program or activity" of the FCC. 29 U.S.C. § 794(a). CPT claims that electrically sensitive people are generally being excluded from aspects of modern life by the proliferation of RF transmitters. But CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any "program or activity" of the FCC. Thus, CPT's Rehabilitation Act claim against the FCC is without merit.

We have considered CPT's remaining arguments for rehearing and find them to be without merit. The petition for rehearing is therefore denied.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

40 Foley Square
New York, New York 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 15th day of June, Two Thousand

Present:

Hon. Jon O. Newman,
Hon. John M. Walker, Jr.,
Hon. Robert D. Sack,

Circuit Judges.

UNITED STATES
COURT OF APPEALS
FILED
JUNE 15 2000
Roseann B. MacKechnie,
Clerk
SECOND CIRCUIT

CELLULAR PHONE TASKFORCE, *et al.*,

Petitioners,

CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION, *et al.*,

Intervenors,

FEDERAL COMMUNICATIONS COMMISSION & UNITED STATES OF AMERICA,

Respondents.

Docket Nos.:

97-4328(L),
98-4003(Con),
98-4005(Con),
98-4025(Con),
98-4122(Con)

A petition for panel rehearing having been filed herein by Petitioners Communication Workers of America, AFL-CIO, CWA Local 7810 & the Washington State Council of CWA Locals.

Upon consideration thereof, it is Ordered that said petition be and it hereby is **DENIED**.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador

Beth J. Meador,
Administrative Attorney

CONSTITUTIONAL PROVISIONS:

Article 1, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article 1, Section 8, Paragraph 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment One

Congress shall make no law . . . abridging the freedom of speech . . .

Amendment Five

. . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

Amendment Ten

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Telecommunications Act of 1996, P.L. 104–104, 110 Stat. 151, Sec. 704(a) and (b), as follows:

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY. — Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

"(7) PRESERVATION OF LOCAL ZONING AUTHORITY. —

"(A) GENERAL AUTHORITY. — Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

"(B) LIMITATIONS. —

"(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof —

"(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

"(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

"(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or

instrumentality, taking into account the nature and scope of such request.

"(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

"(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

"(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

"(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

"(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).".

(b) RADIO FREQUENCY EMISSIONS. — Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

National Environmental Policy Act, 42 U.S.C. 4332, in relevant part:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall —

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Rehabilitation Act, 29 U.S.C. 794(a) and (b), as follows:

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with handicaps in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of —

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 1471(12) of the Elementary and Secondary Education Act of 1965 [20 USCS § 2891(12)]), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship —

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

47 CFR 1.1801 *et seq.*, "Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Communications Commission." In relevant part:

1.1830(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap —

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

* * *

(3) The Commission may not directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would —

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

* * *

(6) The Commission may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the Commission establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to

discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the Commission are not, themselves, covered by this part.

1.1870 *Compliance procedures.*

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791.

(c) The Managing Director shall be responsible for coordinating implementation of this section. Complaints may be sent to the Handicapped Coordinator, Office of Managing Director, Federal Communications Commission, 1919 M Street NW., Room 852, Washington, DC 20554.

(d) *Acceptance of complaint.* (1) The Commission shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within one-hundred eighty (180) days of the alleged act of discrimination. The Commission may extend this time period for good cause.

(e) If the Commission receives a complaint that is not complete, the complainant will be notified within thirty (30) days of receipt of the incomplete complaint that additional information is needed. If the complainant fails to complete the complaint within thirty (30) days of receipt of this notice, the Commission shall dismiss the complaint without prejudice.

(f) If the Commission receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity."

* * *

(g) Within one-hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing —

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within ninety (90) days of receipt from the Commission of the letter required by §1.1870(g). The Commission may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Office of the Secretary, Federal Communications Commission, 1919 M Street NW., Room 202, Washington, DC 20554.

(j) The Commission shall notify the complainant of the results of the appeal within sixty (60) days of the receipt of the request. If the Commission determines that it needs additional information from the complainant, it shall have sixty (60) days from the date it receives the additional information to make its determination on the appeal.

2 FCC rcd Vol. 8: 2199-2213, FCC 87-108, Gen. Docket No. 84-533, In the Matter of Amendment of Part I of the Commission's Rules to Implement Section 504 of the Rehabilitation Act of 1973, as Amended, 29 U.S.C. §794. *Report and Order*, adopted March 27, 1987. In relevant parts:

Section 1.1830 *General prohibition against discrimination*

* * *

Paragraph (b)(6) prohibits the Commission from discriminating against qualified individuals with handicaps on the basis of handicap in the granting of licenses or certification . . .

In addition, the Commission may not establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. For example, the Commission must comply with these non-discrimination requirements when establishing safety standards for the operations of licensees. Thus, the Commission must ensure that standards that it promulgates do not discriminate against the employment of qualified individuals with handicaps in an impermissible manner.

Paragraph (b)(6) does not extend section 504 directly to the programs or activities of licensees or certified entities themselves. The programs or activities of Federal licensees or certified entities are not themselves federally conducted programs or activities nor are they programs or activities receiving Federal financial assistance merely by virtue of the Federal license or certificate. However, as noted above, section 504 may affect the content of the rules established by the agency for the operation of the program or activity of the licensee or certified entity, and thereby indirectly affect limited aspects of their operations. [pp. 2203-2204]

* * *

Section 1.1870 *Compliance procedures*

* * *

One appeal within the Commission shall be provided (section 1.1870(i)). The appeal will not be heard by the same person who made the initial determination of compliance or noncompliance (section 1.1870(i)). [p. 2208]

Arthur Firstenberg
Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210
(718) 434-4499

DOCKET FILE COPY ORIGINAL

February 2, 1997

Handicapped Coordinator
Office of Managing Director
Federal Communications Commission
1919 M Street NW, Room 852
Washington, DC 20554

FCC MAIL ROOM
FEB 6 1997
RECEIVED

COMPLAINT

To the Handicapped Coordinator:

Please accept this complaint of discrimination by the Federal Communications Commission on the basis of handicap.

On August 6, 1996 the Federal Communications Commission (FCC) adopted into effect its Report and Order in the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62. This action by the FCC discriminates against electrosensitive individuals, numbering at least 2% of the population of the United States. These individuals must, by medical necessity, avoid all exposure to artificial electromagnetic fields, and are harmed by microwaves at levels many orders of magnitude lower than those permitted by the Safety Guidelines adopted by the FCC on August 6, 1996. This will have the effect of depriving this large disabled population, which is represented as a class by the Cellular Phone Taskforce, of their health and in some cases of their lives, because the expected proliferation of microwave emitting sources throughout the country in the wake of the

new Safety Guidelines will not leave the electrosensitive any areas of the United States where they will be able to avoid exposure to microwaves. The public streets, all public places, and their own homes will become inaccessible to them.

The electrosensitive are qualified individuals with handicaps as defined in 47 CFR Ch. 1, Sec. 1.1803. We are individuals with handicaps. Instead of benefiting from the improved communication networks allowed by this FCC action, this group of Americans will be, and already is, severely harmed.

47 CFR Ch. 1, Sec 1.1830(a) states that "no qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission."

47 CFR Ch. 1, Sec. 1.1830(b)(3) further states that "the Commission may not . . . utilize criteria or methods of administration the purpose or effect of which would subject qualified individuals with handicaps to discrimination on the basis of handicap.

The electrosensitive are discriminated against by the Commission's August 6 Report and Order, and its Final Rule, under the clauses cited above.

Enclosed are the following:

1. Petition for Reconsideration filed August 30, 1996 by the Cellular Phone Taskforce.

2. Reply to Comments of AT&T Wireless Services, Inc., filed October 15, 1996 by the Cellular Phone Taskforce. Page 9 of this reply is a relevant letter by Lucinda Grant of the Electrical Sensitivity Network.

3. Notice of Decision — Fully Favorable, dated April 17, 1996, establishing this writer as a qualified individual with handicap as recognized by the Social Security Administration. My electrosensitivity was acknowledged in the decision.

4. Letter from Dr. Kenneth Jaffe concerning this writer's electrosensitivity, dated Nov. 15, 1994.

5. Pages 33–37 of *Microwaving Our Planet: The Environmental Impact of the Wireless Revolution*, Arthur Firstenberg, New York: Cellular Phone Taskforce, 1996, on electrosensitivity, including extensive scientific and medical documentation. This book reviews the known and proven hazards of microwave radiation at levels as low as 2.6×10^{-12} milliwatts per square centimeter, twelve orders of magnitude lower than what the FCC permitted on August 6, 1996.

The members of the electrosensitive class represented by the Cellular Phone Taskforce live throughout the United States. We are aware of hundreds in New York City alone who have been made ill or even forced to leave their homes and their city by the radiation from new transmitting antennas which are in compliance with the August 6, 1996 Safety Guidelines of the FCC.

Any further information will be gladly furnished upon request from the undersigned.

Sincerely,

/s/ Arthur Firstenberg

Arthur Firstenberg
Chairman, Cellular Phone Taskforce

Federal Communications Commission
Washington, D.C. 20554

[SEAL]

JUL 14 1997

Arthur Firstenberg
Cellular Phone Taskforce
P.O. Box 100404
Vanderveer Station
Brooklyn, NY 11210

Dear Mr. Firstenberg:

Your letter of February 2, 1997, addressed to the "Handicapped Coordinator" of the Federal Communications Commission (FCC) was forwarded to this office from the FCC's Disabilities Issues Task Force (DITF). Your letter included a complaint of discrimination on the basis of a disability. Specifically, your letter claims that the FCC's action in ET Docket 93-62, adopting new guidelines for human exposure to radiofrequency electromagnetic fields, discriminates against individuals who are "electrosensitive."

Your letter included several attachments, including a copy of the petition for reconsideration, dated August 30, 1996, that was filed by you and your organization in the above-referenced docket. The purpose of this letter is to advise you that your petition was accepted by the FCC, and it, along with several other petitions for reconsideration, is still under consideration by the Commission. The issue of electrosensitivity discussed in your letter was also one of the issues raised in your petition. The Commission will address all of the issues in the various petitions, including yours, in a forthcoming decision. Therefore, we cannot consider your complaint separately but, rather, refer you to the final FCC decision, expected within the next several weeks. This decision will be posted on the FCC's World Wide Web Site: www.fcc.gov, and will also be available at the DITF Web Site: www.fcc.dtf.

If you have further questions, please contact our radio-frequency safety program at (202) 418-2464.

Sincerely,

/s/ Richard M. Smith

Richard M. Smith
Chief
Office of Engineering and Technology

cc. M. Cove, DITF

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Complaint of Discrimination
on the Basis of Handicap
Filed by the Cellular Phone
Taskforce on February 2, 1997

APPEAL

The Cellular Phone Taskforce ("Taskforce") hereby appeals the denial of the above-referenced Complaint, as contained in the letter of July 14, 1997 from the Commission to the Taskforce. This appeal is based on the failure of the Commission to address the several issues raised in said Complaint, and also on the failure of the Commission to follow its own required procedures as set forth in 47 CFR 1.1870.

1. *The Complaint was accepted by the Commission.*

The Taskforce received correspondence from the Disabilities Issues Task Force ("DITF") in March 1997 requesting to defer consideration of the Complaint pending the expected release of the Second Memorandum Opinion and Order in ET Docket 93-62, which, according to the DITF, would address the issues raised by the Taskforce in its Complaint. The Taskforce further received a letter on July 14, 1997 from the Office of Engineering and Technology, again deferring consideration of the Complaint pending the expected release of the Second Memorandum.

The Commission's rules state, in 47 CFR 1.1870(d)(1), that "The Commission shall accept and investigate all complete complaints for which it has jurisdiction." The rules state further in Section 1.1870(d)(2) that "the complainant will be notified within thirty (30) days" if the complaint is not

complete, and in Section 1.1870(e) that the Commission "shall promptly notify the complainant" if the Commission does not have jurisdiction over the complaint.

The two letters received by the Taskforce from separate offices of the Commission, and the absence of timely notification of either incompletion or lack of jurisdiction, constitute acceptance of the Taskforce's Complaint of February 2, 1997 under the Commission's rules.

2. *The Commission failed to follow its own procedures.*

The Commission's rules state, in 47 CFR 1.1870(g):

> "Within one-hundred eighty (180) days of the receipt of a complete complaint for which it has jurisdiction, the Commission shall notify the complainant of the results of the investigation in a letter containing--
>
> "(l) Findings of fact and conclusions of law;
> "(2) A description of a remedy for each violation found;
> and
> "(3) A notice of the right to appeal."

The one-hundred eighty days from the date of the Taskforce's Complaint expired on August 1, 1997. The only response to the Complaint by the Commission before this date is the letter of July 14, 1997 from the Office of Engineering and Technology, signed by Richard M. Smith. This letter not only failed to state findings of fact and conclusions of law, as required, but specifically deferred doing so, in violation of Commission rules.

Furthermore, the letter of July 14, 1997 did not contain a notice of the right of the Taskforce to appeal, also as required by the Commission's rules.

3. *The issue of discrimination was incorrectly deferred to a decision in ET Docket 93-62.*

The Complaint of February 2 specifically alleges that the Final Rule in ET Docket 93-62 is an act of discrimination by the Commission against a group of qualified disabled individuals, under 47 CFR 1.1830(a) and (b). The issue of discrimination *by the Commission* is not an issue that was raised in ET Docket 93-62. Therefore the Second Memorandum Opinion and Order in that Docket could not have been expected to, and in fact did not, address this issue, and the matter therefore remains unresolved.

4. *The issue of electrosensitivity also remains unaddressed.*

The Commission disposed of the issue of electrosensitivity in the Second Memorandum Opinion and Order by merely noting in paragraph 31 that it is not qualified to evaluate the issue, and implying that such evaluation should be done by "expert organizations and federal agencies with responsibilities for health and safety."

If it is the case, as implied in paragraph 31 of the Second Memorandum, that the Commission does not have jurisdiction over complaints involving electrosensitivity, then the Commission is required under its rules, in 47 CFR 1.1870(e), to refer the complaint to the appropriate government agency, and the Commission should not have accepted this Complaint.

If, however, the Commission does have jurisdiction, then it is incumbent on the Commission to investigate complaints based on electrosensitivity and to produce findings of fact and conclusions of law as required in Section 1.1870(g).

5. *Conclusion.*

The letter of July 14, 1997 constitutes the extent of the Commission's response to the Taskforce's complaint of February 2, 1997, and as such is a denial of said complaint. The specifics of the complaint, namely discrimination on the basis of electrosensitivity, were not investigated, and findings of fact and conclusions of law were not made. The Taskforce therefore appeals this denial under the procedures set forth in 47 CFR 1.1870(h). The electrosensitive of the United States, being a class of qualified individuals with handicaps, continue to be deprived of our health, our welfare, our livelihood, our homes, our enjoyment of life, the use of the national communication and transportation networks, and our future, by virtue of the Radiofrequency Safety Guidelines adopted by the Commission on August 6, 1997. Those Safety Guidelines must be set aside.

Respectfully submitted,

October 6, 1997 by /s/ Arthur Firstenberg

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210
(718) 434-4499

Federal Communications Commission
Washington, D.C. 20554

[SEAL]

FEB 2 1998

Arthur Firstenberg
President, Cellular Phone Taskforce
Post Office Box 100404
Vanderveer Station
Brooklyn, New York 11210

Dear Mr. Firstenberg:

This is in response to the pleading ("Appeal") filed by the Cellular Phone Taskforce ("Taskforce") with the Federal Communications Commission (FCC) on October 8, 1997. The Taskforce claims that the Commission failed to address several issues raised in the Taskforce's original pleading ("Complaint") filed with the FCC on February 3, 1997, alleging discrimination by the FCC on the basis of handicap ("electrosensitivity").

The Taskforce makes the following claims: (1) that the Taskforce's pleading was accepted by the Commission as a formal complaint under 47 CFR 1.1801 *et seq.*, implying FCC jurisdiction, but that the FCC improperly deferred considering it, pending the expected release of the FCC's *Second Memorandum Opinion and Order* in ET Docket 93-62, as stated in a letter, dated July 14, 1997, from Richard M. Smith, Chief, FCC Office of Engineering and Technology; (2) that the Commission failed to follow its own procedures as outlined in 47 CFR 1.1870(g); (3) that the issue of discrimination was incorrectly deferred to a decision in ET Docket 93-62; and (4) that the issue of electrosensitivity remains unaddressed by the FCC. In its conclusion, the Taskforce urges that the radiofrequency safety guidelines adopted by the FCC in 1996, and reaffirmed in 1997, be set aside.

With regard to point (1), the letter of July 14, 1997, from Mr. Smith stated that the Taskforce's pleading would be considered along with the several petitions for reconsideration filed in ET Docket 93-62, including the one filed previously by the Taskforce, and that, therefore, the FCC could not consider your pleading separately pending the forthcoming decision in that docket. In other words your pleading was not considered by the Commission to be a formal complaint filed under the FCC's Rules in 47 CFR 1.1801 *et seq.*

With respect to the Taskforce's claim that radiofrequency emissions from our licensees are discriminating against certain "electrosensitive" individuals, 47 CFR 1.1802 and 1.1830(b)(6) state that "the programs and activities of entities that are licensed or certified by the FCC are not covered by these regulations." This is consistent with legal precedent that has held that Section 794 of the Rehabilitation Act of 1973 does not allocate enforcement responsibilities to Federal agencies with respect to their licensees, and that the phrase "activity or program" refers to programs or activities administered or funded by Federal agencies and not those of entities licensed or certified by the FCC. (*See Community Television of Southern California v. Gottfried*, 103 S Ct 885 (1983); *California Association of the Physically Handicapped v. FCC*, 840 F. 2d 88 (1988). Since the FCC's RF guidelines do not have an "effect" until actually implemented and utilized by our licensees, a complaint about the guidelines is, in effect, a complaint about activities of regulated entities and, thus, outside the scope of our regulations implementing the Rehabilitation Act. This reasoning further supports the Commission's decision not to formally "accept" the original pleading as a complaint of discrimination under the rules implementing the Rehabilitation Act.

Concerning point (2), the Commission dealt with your pleading and earlier petition along with other petitions, as the July 14 letter stated it would, in the *Second Memorandum Opinion*

and Order, FCC 97-303, issued by the Commission on August 25, 1997. As discussed above, since your "complaint" does not present a cognizable claim under the Rehabilitation Act or our implementing regulations, the objections you outlined claiming the FCC did not follow the procedures of 47 CFR 1.1870(g) are invalid.

Point (3) claims that the issue of discrimination was incorrectly deferred to ET Docket 93-62 and was not properly addressed there. As noted above, the Taskforce's February pleading was appropriately considered, along with other pleadings, in ET Docket 93-62. Therefore, the issues raised in the Taskforce's pleading, namely that electrosensitive persons are harmed by the FCC's new guidelines, was addressed in that docket (see paragraphs 31 and 111 of the *Second Memorandum Opinion and Order*).

Similarly, point (4) claims the Commission has failed to address the issue of "electrosensitivity." As stated above, this issue was clearly discussed in the *Second Memorandum Opinion and Order.* For example, in paragraph 111 of the Order the Commission states:

> "The Commission does not have the expertise to make independent judgements on such alleged health effects as "electrosensitivity" or other reported effects on human health. This is the responsibility of the federal health and safety agencies and other qualified public health organizations. Therefore, we continue to consider our new guidelines appropriately protective of public health. There is no evidence to suggest that transmitters or facilities that comply with our guidelines will cause adverse health effects. Our guidelines adopted the most conservative aspects of the ANSI/IEEE and NCRP recommended exposure criteria and have been recommended by all of the relevant health and safety agencies."

Therefore, for the aforementioned reasons, the "Appeal," filed by the Taskforce on October 8, 1997, is not accepted by the Commission as valid under its rules in 47 CFR 1.1801 *et seq.*, and it will not be considered under the procedures set forth in those sections of the FCC's Rules and Regulations.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Richard M. Smith

Richard M. Smith
Chief
Office of Engineering and Technology

Supreme Court, U.S.
FILED
OCT 13 2000

(2)
No. 00-393

In the
Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* TOWN OF ISLIP, TOWN OF BROOKHAVEN, TOWN OF SMITHTOWN, TOWN OF HUNTINGTON and TOWN OF OYSTER BAY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VINCENT J. MESSINA, JR.
Town Attorney
Town of Islip
Islip Town Hall
655 Main Street
Islip, New York 11751

ANNETTE EADERESTO
Town Attorney
Town of Brookhaven
3233 Route 112
Medford, New York 11763

RONALD J. ROSENBERG*
ROBERT M. CALICA
EDWARD M. ROSS
ROSENBERG CALICA & BIRNEY LLP
100 Garden City Plaza
Garden City, New York 11530
(516) 747-7400

Attorneys for Amici Curiae

* Counsel of Record

(For Further Appearances See Reverse Side of Cover)

12pp

JOHN B. ZOLLO
Town Attorney
Town of Smithtown
99 West Main Street
Smithtown, New York 11787

GREGORY J. GIAMMALVO
Town Attorney
Town of Oyster Bay
Town Hall East
54 Audrey Avenue
Oyster Bay, New York 11771

THELMA NEIRA
Town Attorney
Town of Huntington
100 Main Street
Huntington, NY 11743

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	
REASONS FOR GRANTING CERTIORARI	2
ARGUMENT	
THE TELECOMMUNICATIONS ACT OF 1996 USURPS THE LOCAL ZONING POWERS TRADITIONALLY RESERVED FOR THE STATES AND LOCAL GOVERNMENT	5
CONCLUSION	8

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Alden v. Maine, 527 U.S. 706 (1999)	6
AT & T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)	4, n.3
Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999)	3
New York v. United States, 505 U.S. 144 (1992)	4, 6
Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000)	4, 5
Printz v. United States, 521 U.S. 898 (1997)	6, 7
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	2
Statutory Authorities:	
47 U.S.C. Sec. 332(c)(7)(B)(iv)	5
Telecommunications Act of 1996	1-5, 7
N.Y. Town L. Sec. 261	1

INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are contiguous town governments located in New York State, serving a combined total population of approximately 1,300,000 persons, covering roughly 730 square miles.

The estimated population of the *amici curiae* are as follows: Town of Islip (300,000); Town of Brookhaven (400,000); Town of Smithtown (150,000); Town of Huntington (200,000); and Town of Oyster Bay (300,000).

The *amici curiae* are responsible for a wide range of municipal affairs and local governance over diverse matters of public interest, including local zoning authority over the placement of cellular phone towers within their jurisdiction, together with primary responsibilities for local zoning and planning matters commensurate with their municipal charters and applicable State and Local Laws.

The N.Y. Town Law expressly confers upon the *amici curiae* and their town boards broad zoning powers to regulate the size, use and location of buildings, structures and land "[f]or the purpose of promoting the health, safety, morals, or the general welfare of the community." N.Y. Town L. Sec. 261 (McKinney's Supp. 1990).

The *Telecommunications Act of 1996* commandeers the *amici curiae* to administer an unconstitutional system which strips them of their local zoning powers to address the health, safety and welfare of their citizens — i.e., Euclidian zoning

---

[1] This brief is submitted pursuant to Rule 37.4 of the Rules of this Court by and on behalf of the designated towns and town attorneys, who are authorized law officers.

powers[2] traditionally reserved for the states and local government.

The *amici curiae* are uniquely situated to complain of the erosion of their local zoning powers. In the face of an awesome explosion of cellular phone towers, town boards and zoning boards of appeal have been rendered powerless to resort to traditional zoning and planning measures — e.g., considerations of alternative sites based upon health, safety or welfare concerns, including proximity to schools and densely populated residential areas. As a result of the *Telecommunications Act*, the *amici curiae* are now impotent to address the legitimate concerns of angry and bewildered citizens who rightfully ask why their local governments are powerless to address their health, safety and welfare concerns at the local level.

SUMMARY OF ARGUMENT
REASONS FOR GRANTING CERTIORARI

Foremost, the *amici curiae* contend that certiorari should be granted in order to declare the *Telecommunications Act of 1996* unconstitutional under the Tenth Amendment, and thereby restore to the *amici curiae* their local zoning powers traditionally reserved for the states and local government.

The *Telecommunications Act of 1996* requires the *amici curiae* to grant a plethora of local zoning applications regarding the siting and construction of cellular phone towers — e.g., change of use permits; rezoning proposals; site plan approvals . . . etc. — all without due regard for the myriad health, safety and welfare concerns associated therewith.

In so doing, the *Telecommunications Act* deprives the *amici curiae* of their ability to rely upon traditional zoning and

---

[2] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

planning measures — e.g., considerations of alternative sites based upon proximity to schools and densely populated residential areas — to address local health, safety and welfare concerns.

At the same time, the *amici curiae* have been faced with an alarming boom in applications for the siting and construction of cellular phone towers — and predict unparalleled growth in the coming years.

Since the passage of the *Telecommunications Act*, town boards and zoning boards of appeal are now repeatedly confronted with this all too familiar scenario:

> A cellular phone company (i.e., the applicant) applies for a local zoning permit in order to build a cellular phone tower in close proximity to a local grade school. Concerned citizens flock to the public hearing to voice their concerns over potentially adverse health consequences. They convincingly urge both the applicant and the local zoning board to consider an alternative location, and to consider the potentially adverse health effects which may result from the placement of a cellular phone tower in close proximity to the grade school.

Under the *Telecommunications Act*, the local zoning board in the above scenario is often hamstrung to stifle public participation, and to mechanically grant the application. The cellular phone company holds all the cards. If the local zoning board takes into consideration any of the myriad health, safety or welfare concerns raised by its citizens, then the applicant will simply bring suit under the *Telecommunications Act* to compel the issuance of the permit by the local board. *See, e.g., Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999). Even mentioning the potentially adverse health effects associated with cellular phone towers gives the applicant cause to challenge an adverse zoning

decision in court. *Id.* The normal breadth of public discourse and democratic processes suffer greatly.

The *amici curiae* have been subjected to repeated and growing complaints by their alarmed electorate who express anger and dissatisfaction over the silencing effect which the *Telecommunications Act* has engendered, and the inability of their town governments to respond to their concerns, while the FCC and the federal government remain distant bodies. *See New York v. United States*, 505 U.S. 144, 169 (1992) (inviolable principles of dual sovereignty are compromised where "state officials . . . bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision").

In a stunning blow to the Tenth Amendment, the *amici curiae* have all at once been commandeered by the *Telecommunications Act* and disenfranchised from their own electorate. *See id.*

Certiorari is thus warranted to restore the *amici curiae's* local zoning and planning powers, and to restore voice and reason to their local electorate.

Certiorari is also warranted to address the conflict between the Second Circuit (in this case) and the Fourth Circuit over the constitutionality of the *Telecommunications Act of 1996*.[3] *See Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688,705-06 (4th Cir. 2000) (concurring opinion):

---

[3] Last term, on writs of certiorari, this Court examined several rule-making challenges to the *Telecommunications Act of 1996* asserted by state utility commissions and incumbent telephone local exchange carriers. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The constitutional questions and public policy implications of this case are far more profound.

through a compromise involving a partial preemption approach, [Congress] enacted §704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

ARGUMENT

THE TELECOMMUNICATIONS ACT OF 1996 USURPS THE LOCAL ZONING POWERS TRADITIONALLY RESERVED FOR THE STATES AND LOCAL GOVERNMENT

The *Telecommunications Act of 1996* strikes a severe blow to the governmental sovereignty of the *amici curiae*.

As witnessed first hand by each of the *amici curiae*, local town boards and zoning boards of appeals have been driven to stifle public participation in local zoning matters, and have been forced to grant a growing number of applications for the indiscriminate placement and construction of cellular phone towers without due regard for the health, safety and welfare of their own electorate.

47 U.S.C. Sec. 332(c)(7)(B)(iv) provides, in relevant part:

No state or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless service facilities on the basis of

the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such facilities.

The Federal Communications Commission has promulgated implementing regulations which, among other things, fail to take into consideration *any* environmental effects other than "thermal effects" from radiation (i.e., as distinguished from non-thermal or "biological effects" associated with cancer and other diseases). In fact, despite the "partial preemption" (*Petersburg, supra*, at 705) by Congress and the FCC in this area, Congress has utterly failed to fund EPA research into the biological effects associated with cellular phone towers and related facilities.[4]

In *New York v. United States*, this Court recognized and adhered to the inviolable sovereignty belonging to the states and local government rooted in the Tenth Amendment. 505 U.S. 144 (1992). This Court's recent Tenth Amendment decisions in *Alden v. Maine* and *Printz v. United States* likewise adhere to the fundamental importance of dual sovereignty. *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997).

As emphasized in *New York*, under the Tenth Amendment, Congress may not commandeer the states and local governments to "enact and enforce a federal regulatory program," (*New York*, 505 U.S. at 151, *quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)). Nor may the federal government intrude upon the "residuary and inviolable sovereignty" retained by the states under the Constitution. *Alden*, 527 U.S. at 715 (*quoting The Federalist* No. 39 at 245). Stated differently, a congressional act which threatens to "compromise the structural framework

---

[4] We respectfully refer to the main petition filed by Citizens for the Appropriate Placement of Telecommunications Facilities, et al.

of dual sovereignty" is "categorically" unconstitutional and "no comparative assessments of the various interests [involved] can overcome that fundamental defect." *Printz*, 521 U.S. at 932-33.

Applying these principles, the *Telecommunications Act* strikes an unacceptable balance of power between the federal government and the *amici curiae*. Although cloaked in the garb of "compromise," the *Telecommunications Act* in reality commandeers the *amici curiae* to administer a federally-mandated program which deprives the *amici curiae* of their ability to address important matters of public concern at the local level. Rather than promote dual sovereignty, the *Telecommunications Act* merely erodes it. Worse still, the *Telecommunications Act* stifles public participation and shackles local town boards and local zoning boards of appeal by rendering them impotent to address the legitimate health, safety and welfare concerns of their electorate.

For all of these reasons, certiorari should be granted to remedy the constitutional infirmities which beset the *Telecommunications Act of 1996*, and to preserve dual sovereignty under the Tenth Amendment.

CONCLUSION

The Petition for Certiorari should be granted.

Dated: Garden City, New York
October 13, 2000

VINCENT J. MESSINA, JR.
Town Attorney
Town of Islip
Islip Town Hall
655 Main Street
Islip, New York 11751

ANNETTE EADERESTO
Town Attorney
Town of Brookhaven
3233 Route 112
Medford, New York 11763

JOHN B. ZOLLO
Town Attorney
Town of Smithtown
99 West Main Street
Smithtown, New York 11787

THELMA NEIRA
Town Attorney
Town of Huntington
100 Main Street
Huntington, NY 11743

GREGORY J. GIAMMALVO
Town Attorney
Town of Oyster Bay
Town Hall East
54 Audrey Avenue
Oyster Bay, New York 11771

RONALD J. ROSENBERG*
ROBERT M. CALICA
EDWARD M. ROSS
ROSENBERG CALICA
& BIRNEY LLP
100 Garden City Plaza
Garden City, New York 11530
(516) 747-7400

Attorneys for Amici Curiae

* Counsel of Record

Supreme Court, U.S.
FILED
DEC 4 = 2000

(3) (3) (3) (3)

Nos. 00-393, 00-407, 00-417 and 00-427

In the Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET. AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

MICHAEL WORSHAM, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

CHRISTOPHER J. WRIGHT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOEL MARCUS
Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTIONS PRESENTED

1. Whether 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998), which preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless telecommunications facilities, includes preemption of state and local regulation of the human health effects of such facilities.

2. Whether the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) violates the Tenth Amendment.

3. Whether the court of appeals correctly found that the Federal Communications Commission was not required to prepare an Environmental Impact Statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, when it promulgated rules implementing the provisions of that Act.

4. Whether Congress's delegation of authority to the FCC to promulgate rules governing the environmental effects of radiofrequency radiation violated the "nondelegation" doctrine.

5. Whether the court of appeals correctly found that the FCC was not required to solicit the comments of other agencies on record material newly submitted to the FCC during a reconsideration of its initial order promulgating rules governing the environmental effects of radiofrequency radiation.

6. Whether the court of appeals correctly held that the FCC's rules governing the environmental effects of radiofrequency radiation did not violate the Rehabilitation Act of 1973, 29 U.S.C. 794.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	2
Argument	10
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Aegerter v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999)	14
Alden v. *Maine*, 527 U.S. 706 (1999)	16
American Truckin Ass'ns, Inc. v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999), cert. granted, 120 S. Ct. 2003 and 120 S. Ct. 2193	20-21
Andrus v. *Sierra Club*, 442 U.S. 347 (1979)	18
AT&T Wireless PCS, Inc. v. *City Council of Va. Beach*, 155 F.3d 423 (4th Cir. 1988)	12, 14
AT&T Wireless PCS, Inc. v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999)	14
Bay Area Addiction Research & Treatment, Inc. v. *City of Antioch*, 179 F.3d 725 (9th Cir. 1999)	25
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986)	13
California Ass'n of the Physically Handicapped, Inc. v. FCC, 840 F.2d 88 (D.C. Cir. 1988)	25
Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Community Television of S. Cal. v. *Gottfried*, 459 U.S. 498 (1983)	25
Environmental Defense Fund v. *EPA*, 489 F.2d 1247 (D.C. Cir. 1973)	8

Cases—Continued: Page

FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 20
Freeman v. *Burlington Broadcasters, Inc.*, 204 F.3d 311 (2d Cir. 2000) 12
Gillespie v. *City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) 13
Heartwood, Inc. v. *United States Forest Service*, 230 F.3d 947 (7th Cir. 2000) 18
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) 15
J.W. Hampton, Jr., Co. v. *United States*, 276 U.S. 394 (1928) 19
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 13
Maurer v. *Hamilton*, 309 U.S. 598 (1940) 11
Mistretta v. *United States*, 488 U.S. 361 (1989) 19
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 20
New York v. *United States*, 505 U.S. 144 (1992) 14
Petersburg Cellular Partnership v. *Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) 15, 16
Primeco Personal Communications v. *Village of Fox Fox*, 35 F. Supp.2d 643 (N.D. Ill. 1999) 12
Printz v. *United States*, 521 U.S. 898 (1997) 13, 14
Schlesinger v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974) 16
Sprint Spectrum, L.P. v. *Willoth*, 176 F.3d 630 (2d Cir. 1999) 14
Testa v. *Katt*, 330 U.S. 386 (1947) 15
Warth v. *Seldin*, 422 U.S. 490 (1975) 13
Wisconsin v. *Weinberger*, 745 F.2d 412 (7th Cir. 1984) 23

Constitution, statutes, regulations and rule: Page

U.S. Const. Amend. X 9, 12, 15, 16
Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* 9
Communications Act of 1934, 47 U.S.C. 151 *et seq.*:
47 U.S.C. 151 (1994 & Supp. IV 1998) 21
47 U.S.C. 154(i) 20
47 U.S.C. 157(a) 21
47 U.S.C. 303(c) 20
47 U.S.C. 303(e) 20
47 U.S.C. 303(f) (1994 & Supp. IV 1998) 20
47 U.S.C. 303(r) 20
47 U.S.C. 309(a) 20
47 U.S.C. 309(j)(3)(D) (Supp. IV 1998) 21
47 U.S.C. 324 24
47 U.S.C. 332(c)(7) (Supp. IV 1998) 6
47 U.S.C. 332(c)(7)(A) (Supp. IV 1998) 8, 14
47 U.S.C. 332(c)(7)(B)(ii) (Supp. IV 1998) 6
47 U.S.C. 332(c)(7)(B)(iii) (Supp. IV 1998) 6, 16
47 U.S.C. 332(c)(7)(B)(iv) (Supp. IV 1998) 6, 8, 10, 12, 14, 16
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 2
42 U.S.C. 4332(2)(C) 2
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
29 U.S.C. 794 (1994 & Supp. IV 1998) 7, 24
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 6
§ 704, 110 Stat. 151 9
§ 704(a), 110 Stat. 151 6
§ 704(b), 110 Stat. 152 ..... 6, 10, 19
40 C.F.R.:
Section 1507.3 18
Section 1507.3(b) 5
Section 1507.3(b)(2) 3

Regulations and rule—Continued:	Page
Section 1508.4	2
Section 1508.9	2
Section 1508.13	2
47 C.F.R.:	
Section 1.1307(b)	5
Section 1.1307(e)	7
Section 1.1830(b)(6)	7, 25
Fed. R. App. P. 28(j)	23
Miscellaneous:	
Biological Effects of Radiofrequency Radiation, 100 F.C.C. 2d 543 (1985)	3, 4
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rulemaking, 8 F.C.C.R. 2849 (1993)	4, 11
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order, 11 F.C.C.R. 15,123 (1996)	5, 22
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order, 12 F.C.C.R. 13,494 (1997)	5, 21,22, 23, 24
H.R. Rep. No. 204, 104th Cong., 1st Sess. (1995)	6, 11
Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998)	7
Letter from Robert Brenner, Acting Deputy Assistant Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999)	23-24
National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86 (1986)	3

Miscellaneous—Continued:

Page

Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56 (4th ed. 1999) 3

In the Supreme Court of the United States

No. 00-393

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, ET AL., *PETITIONERS*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-407

DAVID FICHTENBERG, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-417

MICHAEL WORSHAM, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 00-427

CELLULAR PHONE TASKFORCE, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A22[1]) is reported at 205 F.3d 82.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2000. Petitions for rehearing were denied on June 6, 2000 (Pet. App. A23-A25) and June 15, 2000 (Pet. App. A26-A27). The petition for a writ of certiorari in No. 00-393 was filed on September 8, 2000. The petitions in Nos. 00-407, 00-417 and 00-427 were filed on September 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), requires that in connection with "major Federal actions significantly affecting the quality of the human environment," federal agencies prepare an "environmental impact" statement (EIS) that assesses the environmental effects of a proposed project. 42 U.S.C. 4332(2)(C). Not all activities, however, are "major" actions requiring such an analysis. Under rules established by the Council on Environmental Quality (CEQ), the agency that administers NEPA, some projects require only an "environmental assessment" (EA), which may be followed by a "finding of no significant impact" (FONSI). 40 C.F.R. 1508.9, 1508.13. Other actions may be "categorically excluded" from environmental analysis. 40 C.F.R. 1508.4. Determining which level of environmental scrutiny to apply to specific categories of activities is largely left to the

---

[1] Citations to "Pet. App." refer to the appendix to the petition in No. 00-393.

individual agencies. An agency must, however, define three "classes of action": those that "normally do require environmental impact statements," those that "normally do not require" any environmental evaluation, and those that "normally require environmental assessments but not necessarily environmental impact statements." 40 C.F.R. 1507.3(b)(2).

2. a. All types of wireless communications, including television, radio, cellular telephones, pagers, and similar devices, work by sending and receiving electromagnetic signals. The energy fields generated by the transmitters of radio signals, referred to as radiofrequency or RF radiation, can affect the environment. Specifically, high levels of RF energy can cause the heating of human tissue, known as a "thermal" effect.[2] In 1985, the Federal Communications Commission (FCC) implemented, pursuant to NEPA and directives issued by the CEQ, rules that specified the emission levels above which human exposure to RF energy caused by FCC-licensed transmitters would require environmental analysis under NEPA. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C. 2d 543 (1985).

The exposure limits were based on RF safety standards that had been adopted in 1982 by the American

---

[2] Microwave ovens work by virtue of the thermal effect of extremely high levels of RF energy. See Office of Engineering and Technology, FCC, *Questions and Answers About Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields*, OET Bulletin 56, at 6 (4th ed. 1999). The FCC exposure limit for the general public is one-fiftieth of the point at which RF energy begins to cause any unhealthful thermal effect. See National Council on Radiation Protection and Measurements, *Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields*, NCRP Report No. 86, at 279-283 (1986) (reprinted at C.A. App. 305-307).

National Standards Institute (ANSI), a recognized standard-setting organization. 100 F.C.C. 2d at 551. ANSI established recommended levels of "maximum permissible exposure" or "MPE" for various radio frequencies, since various frequencies cause a thermal effect at different rates. Transmitting facilities that would not lead to human exposure above the limits were considered to have no adverse effect and required no environmental evaluation; preparation of an EA or an EIS was required for transmitters that could cause human exposure above the limits. *Id.* at 561.

In 1992, ANSI issued new RF exposure standards. At about the same time, other organizations such as the congressionally chartered National Council on Radiation Protection and Measurements (NCRP) also issued RF protection standards. The following year, the FCC began a rulemaking proceeding to determine whether it should adopt one of the new standards to replace the 1982 ANSI standards. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Notice of Proposed Rule Making*, 8 F.C.C.R. 2849 (1993) (*RF Notice*).

In the course of the rulemaking proceeding, the Commission received more than one hundred comments representing a broad range of interests. The Commission's staff also consulted with and/or received comments from a number of federal agencies that are responsible for the environment, human health and worker safety: the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Food and Drug Administration (FDA), and the National Institute for Occupational Safety and Health (NIOSH). *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Report and Order*, 11 F.C.C.R.

15,123, 15,129-15,131 (1996) (*RF Order*). When it made its ultimate decision, the FCC gave particular deference to the views of those agencies, which are "expert agencies with respect to determining appropriate levels of safe exposure to RF energy." *Id.* at 15,135. In accordance with the suggestions of the federal environmental and health agencies, the Commission ultimately adopted new guidelines based primarily on the RF exposure limits suggested by the NCRP. *Ibid.*

Under the new RF safety rules, as under the old ones, licensees generally must determine whether their transmitters will cause human exposure above the MPE limits. If so, an EA, and possibly an EIS, must be prepared and the Commission will then determine whether to allow transmission to occur.[3] No further environmental analysis is required for transmitters that will not lead to exposures greater than the limits. 47 C.F.R. 1.1307(b). Certain RF transmitters that operate at low power levels or in inaccessible locations and are thus extremely unlikely to cause exposure above the limits are categorically excluded from having to perform the initial assessment of RF exposure. 47 C.F.R. 1.1307(b); see also 40 C.F.R. 1507.3(b) (allowing agencies to create categorical exclusions). On petitions for reconsideration, the Commission reaffirmed the fundamentals of its initial decision. *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, Second Memorandum Opinion and Order*, 12 F.C.C.R. 13,494 (1997) (*RF Reconsideration Order*).

---

[3] As a practical matter, the FCC's experience is that licensees almost always ensure that their facilities will not cause excess exposure, and environmental analysis is rarely conducted.

b. Shortly before the Commission issued the *RF Order*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, became law. Section 704(a) of that Act, entitled "National Wireless Telecommunications Siting Policy," added a new provision to the Communications Act of 1934, 47 U.S.C. 332(c)(7)(B)(iv),[4] which provides in pertinent part that "[n]o State or local government * * * may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." *Ibid.* In Section 704(b) of the Telecommunications Act Congress also directed that "[w]ithin 180 days * * * the Commission shall complete action in [the RF radiation rulemaking] to prescribe and make effective rules regarding the environmental effects of radio frequency emissions."[5]

The House Commerce Committee, which drafted the preemption provision, explained that the reason for the prohibition was that "siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of" advanced telecommunications services. H.R. Rep. No. 204, 104th Cong., 1st Sess. 94-95 (1995). The Committee explained that "local zoning decisions, while responsive

---

[4] All citations in this brief to 47 U.S.C. 332(c)(7) refer to Supp. IV 1998.

[5] Congress also directed, in a provision not challenged by petitioners in this Court, that state and local zoning authorities act within a "reasonable period of time" after the filing of a request to build a communications tower and that denials of such requests "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. 332(c)(7)(B)(ii) and (iii).

to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence." *Ibid.* In the *RF Order*, the Commission implemented the preemption provisions by adding Section 1.1307(e) to its rules, the language of which tracks the statute. 47 C.F.R. 1.1307(e).

c. In February 1997, the Cellular Telephone Taskforce submitted to the Commission a "complaint" claiming that the RF rules discriminate against persons who are hypersensitive to electromagnetic fields and thereby violate the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998). The Chief of the Office of Engineering and Technology, acting under delegated authority, ultimately dismissed the complaint because it addressed the activities of FCC licensees, not those of the agency itself. Letter from Richard M. Smith, Chief, OET, to Arthur Firstenberg, President, Cellular Phone Taskforce (Feb. 2, 1998) (C.A. App. 6119-6121). The FCC's rules implementing the Rehabilitation Act expressly do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6).

3. a. The court of appeals affirmed the the Commission's orders. Pet. App. A1-A22. The court rejected the claim that the Commission had failed to take into account whether RF energy had deleterious nonthermal effects, finding that there was "room for disagreement * * * among experts in the field" regarding whether such effects existed and that "the FCC was justified in continuing to rely on the ANSI and NCRP standards." *Id.* at A10. The court held that the FCC had committed no error by not supplying the EPA and other agencies with publicly available studies that had been submitted to the FCC during the recon-

sideration proceeding. The FCC "could reasonably expect those agencies to keep abreast of scientific developments" and to "monitor all relevant scientific input" into the FCC's decision. *Ibid.*

The court rejected the claim that the FCC had violated NEPA because it did not prepare an EIS in connection with the rules. "[W]here an agency is engaged primarily in an examination of environmental questions, where substantive and procedural standards ensure full and adequate consideration of environmental issues, then formal compliance with NEPA is not necessary, but functional compliance is sufficient." Pet. App. A17 (quoting *Environmental Defense Fund* v. *EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973)). The court found that the FCC's orders "functionally satisf[ied] the CEQ's requirements for an EA and a FONSI." Pet. App. A17-A18.

The Court upheld the Commission's finding that, although 47 U.S.C. 332(c)(7)(B)(iv) precluded state and local governments from regulating the "placement, construction, and modification" of personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions," that provision applied also to the operation of such facilities. The court noted that under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference must be accorded to the FCC's interpretation of the statute. Pet. App. A20. The court also noted that the savings provision of subsection (A) of the same statute provided only that the FCC may not "limit or affect the authority of a State or local government" over "the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). Since "[s]ubsection (A) does not * * * preserve [state and local governments'] authority to regulate such facilities'

operations * * * the absence of the word 'operation' from the subsequent limitation on their authority under subsection (B)(iv) does not grant such power." Pet. App. A20.

The court rejected the claim that the preemption provision violates the Tenth Amendment. "The statute does not commandeer local authorities to administer a federal program," the court found, because "State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments * * * is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation." Pet. App. A21. Straightforward preemption of that sort, the court found, does not violate the Tenth Amendment.

b. In its initial opinion, the court dismissed claims raised under the Rehabilitation Act and the Americans with Disabilities Act of 1990, 42 U.S.C. 1201 *et seq.* (ADA). Similar claims made before the agency had been resolved by the staff rather than the Commission itself, the court found, and therefore had not been the subject of a final, appealable agency order. Pet. App. A6. Pursuant to a petition for rehearing, the panel decided to address the merits of the claims notwithstanding their lack of finality. The ADA claim failed, the court found, because the relevant part of the ADA does not apply to the federal government. *Id.* at A25. The claim under the Rehabilitation Act lacks merit because that Act applies only to "the discriminatory denial of the benefits of a [federal] 'program or activity,'" and the construction of RF transmitters is not a program or activity of the FCC. *Ibid.*

ARGUMENT

Four parties, Citizens for the Appropriate Placement of Telecommunications Facilities (CAPTF), Cellular Phone Taskforce (CPT), Michael C. Worsham (Worsham) and David Fichtenberg (Fichtenberg), petition for a writ of certiorari. None of the petitions raises any issue that warrants this Court's review.

1. Petitioners Worsham and Fichtenberg claim that the Second Circuit has impermissibly interpreted 47 U.S.C. 332(c)(7)(B)(iv). That statute preempts state and local zoning authorities from regulating the "environmental effects" of personal wireless service facilities as long as the transmitter complies with the FCC's RF exposure standards. Petitioners contend (Worsham Pet. 10-14; Fichtenberg Pet. 32-35) that the court of appeals erroneously interpreted the term "environmental effects" to mean "human health effects." That claim is incorrect.

At the outset, the court below did not address the issue. The court stated in passing (Pet. App. A5) in the background section of its opinion that the preemption provision included human health considerations, but the court did not consider the question in its legal discussion and did not provide any analysis of it. For that reason alone, this case is unsuited for further review.

Moreover, the court of appeals' apparent understanding of the statute was correct and not in conflict with any decision of this Court or another court of appeals. When it enacted Section 332(c)(7)(B)(iv), Congress was clearly concerned with the biological effects of RF energy fields. The statute preempts only "to the extent that such facilities comply with the Commission's regulations concerning [RF] emissions." A tandem provision, Section 704(b) of the Telecom-

munications Act, gave the FCC 180 days to "complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." Both the rulemaking proceeding and the FCC regulations to which Congress referred concerned almost exclusively the biological effects of RF energy. The original 1982 ANSI exposure standards that the FCC adopted in 1985 were based on the absorption of RF energy by the human body and the thermal effects in the human body of various levels of RF exposure. The 1992 ANSI standard, which the Commission proposed to adopt in ET Docket 93-62, see *RF Notice*, *supra*, likewise had to do entirely with human biological effects of RF fields. The statutory preemption of state and local consideration of environmental effects of RF to the degree that a transmitter complied with the FCC's rules thus necessarily was intended to include state and local consideration of biological effects.[6]

Petitioners mistakenly rely on a general presumption that ambiguous statutes should not be interpreted to preempt state law concerning health and safety. Worsham Pet. 9; Fichtenberg Pet. 33-34. That presumption does not apply where, as here, Congress's intent to preempt local consideration of biological effects is "clearly indicated by those considerations which are persuasive of the statutory purpose." *Maurer* v. *Hamilton*, 309 U.S. 598, 614 (1940). That

---

[6] The House Report discussing Section 704 of the Telecommunications Act further confirms that conclusion. The Report expressed Congress's concern that state and local authorities had interfered with the nationwide deployment of wireless communications systems for reasons that were "at times not supported by scientific *and medical* evidence." H.R. Rep. No. 204, *supra*, at 95 (emphasis added).

standard is amply satisfied by the statutory and administrative context of Section 332(c)(7)(B)(iv) as well as its legislative history. That Congress may have distinguished health effects from environmental effects (Worsham Pet. 13-14) in other statutes addressing different problems is of no moment in the face of Congress's evident intent here.

As petitioner Worsham notes, "[t]wo federal courts have essentially agreed with the Court of Appeals in the instant case." Pet. 12 (citing *AT&T Wireless PCS, Inc.* v. *City Council of Va. Beach*, 155 F.3d 423, 431 n.6 (4th Cir. 1988), and *Primeco Personal Communications* v. *Village of Fox Lake*, 35 F. Supp. 2d 643, 645 (N.D. Ill. 1999)). Petitioner Worsham asserts (Pet. 10), however, that the decision of the court of appeals "is arguably inconsistent with" the decision of the Second Circuit in *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, cert. denied, 121 S. Ct. 276 (2000). The cited passage from *Freeman* states that the term "environmental effects" is not defined in the statute and that it "focus[es] on degradation of the natural environment, effects on historical landmarks, *and the biological effects of RF radiation.*" *Id.* at 325 (emphasis added). Accordingly, *Freeman* is entirely consistent with the Second Circuit's holding in this case that the term "environmental effects" includes human health considerations. In any event, further review would not be warranted to resolve an intra-circuit discrepancy.

2. Petitioners CAPTF and Fichtenberg contend (CAPTF Pet. 14-21; Fichtenberg Pet. 35-38) that the preemptive effect of 47 U.S.C. 332(c)(7)(B)(iv) violates the Tenth Amendment. They claim that Congress has impermissibly commandeered the government apparatus of the states. The court of appeals correctly

rejected that claim, and its decision does not conflict with that of any other court of appeals or of this Court.[7]

Congress commandeers the legislative process of States "by directly compelling them to enact and enforce a federal regulatory program." *New York* v. *United States*, 505 U.S. 144, 161 (1992). In *New York*, the Court struck down Congress's requirement that the States either regulate radioactive waste under federal guidelines or take title to and dispose of the waste themselves. *Id.* at 174-175. Having no choice other than one of the two courses set forth by Congress, the States were thus pressed involuntarily into "the service of federal regulatory purposes." *Id.* at 175. Likewise, in *Printz* v. *United States*, 521 U.S. 898 (1997), the Court invalidated a federal statute that required local law enforcement officials to conduct background checks

---

[7] There is a question whether petitioners have standing to present their claim. It is our position that individuals not acting in their official capacity generally lack standing to raise a Tenth Amendment claim, since they cannot establish that any personal injury would be redressed by a favorable decision, and the rights they advance in the litigation are rights of third parties. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Warth* v. *Seldin*, 422 U.S. 490 (1975); but cf. *Gillespie* v. *City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999) (discussing authorities and finding standing to raise Tenth Amendment claim), cert. denied, 120 S. Ct. 934 (2000). In the court of appeals, some individuals identified as state or local government officials were among the parties. See CAPTF Pet. ii-iii. Two of them (Holly A. Fournier and Jeannine Karlsson, see CAPTF Pet. ii) are listed as petitioners before this Court, although it is not clear whether they are acting in their official capacities and whether they are asserting in this litigation rights they hold by virtue of their official capacities. In addition, individual members of a collective governmental body ordinarily do not have standing to assert the rights of the body as a whole. See *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986).

of gun purchasers. That requirement, the Court held, "compel[led] the States to enact or administer a federal regulatory program." *Id.* at 933 (quoting *New York* v. *United States*, 505 U.S. at 188).

Section 332(c)(7)(B)(iv) does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all. Rather, the statute simply limits the factors state and local zoning authorities may consider in the exercise of their ordinary zoning functions. Those authorities may not deny a permit "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." 47 U.S.C. 332(c)(7)(B)(iv). They are permitted to grant or deny permits on any other basis. Indeed, Congress expressly provided that with the exception of RF and a few other matters not before the Court, "nothing * * * shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 U.S.C. 332(c)(7)(A). That proviso leaves intact all other traditional bases for land use decisions, such as aesthetics or neighborhood character, or other local zoning laws. Local authorities throughout the country have successfully rejected tower siting proposals on such grounds. See, *e.g.*, *Sprint Spectrum, L.P.* v. *Willoth*, 176 F.3d 630 (2d Cir. 1999); *Aegerter* v. *City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *AT&T Wireless PCS, Inc.* v. *Winston-Salem Zoning Bd. of Adjustment*, 172 F.3d 307 (4th Cir. 1999); *AT&T* v. *City Council of Va. Beach*, *supra*.

This case thus falls squarely within the principle that federal law may "displace state regulation" even though

this serves to "curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981). Indeed, this Court "long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers." *Id.* at 291; see also *Testa* v. *Katt*, 330 U.S. 386 (1947). The court below thus properly held (Pet. App. A21) that "State and local governments are not required to approve or prohibit anything" and correctly rejected petitioners' Tenth Amendment claims.

Petitioner CAPTF contends (Pet. 16) that the decision below conflicts with the decision of the Fourth Circuit in *Petersburg Cellular Partnership* v. *Board of Supervisors*, 205 F.3d 688 (2000) (per curiam). In that case, the Fourth Circuit upheld a county's decision to permit a communications tower to be built, but there was no agreement on a single rationale. Only a single judge, Judge Niemeyer, would have upheld the county's decision on the ground that certain federal limitations on the county's decision violated the Tenth Amendment. See *id.* at 691; *id.* at 696-705 (opinion of Niemeyer, J.).[8] Accordingly, the Fourth Circuit did not take a position regarding the Tenth Amendment issue

---

[8] The other judge voting to uphold the county's decision based his determination on the ground that the county's decision did not violate any provision of the Telecommunications Act. 205 F.3d at 706-710 (opinion of Widener, J.). The third judge dissented from the court's disposition, on the ground that the county's decision did violate a provision of the Act and that that provision did not violate the Tenth Amendment. *Id.* at 710-720 (opinion of King, J.).

in that case, and the Fourth Circuit's decision in that case therefore does not conflict with the decision of the Second Circuit here.[9]

Also without merit is the claim of CAPTF (Pet. 21) that the decision below conflicts with *Alden* v. *Maine*, 527 U.S. 706 (1999), because, in petitioner's view (Pet. 22), the federal government has allegedly "defaulted on its obligation to protect public health," and it therefore "may not simultaneously *prevent the States from taking action to do so.*" The proposition on which petitioner relies—that federal courts must analyze whether a federal law adequately protects the public health before permitting it to preempt state law—has nothing to do with the Court's decision in *Alden*, which addressed Congress's power to authorize lawsuits against a State in its own courts under federal law.[10] In any event, the court below correctly found that the FCC's RF exposure standards, which were formulated by expert scientific groups that reviewed exhaustive studies and were supported by every federal health and safety

---

[9] In any event, even the position urged by Judge Niemeyer in his concurring opinion in *Petersburg Cellular* does not conflict with the decision of the court below in this case. Judge Niemeyer's opinion expressed his belief that 47 U.S.C. 332(c)(7)(B)(iii), which requires a state or local decision regarding the placement of cellular towers to be "in writing and supported by substantial evidence contained in a written record," 47 U.S.C. 332(c)(7)(B)(iii), violates the Tenth Amendment. He appears to have accepted that the provision at issue here—47 U.S.C. 332(c)(7)(B)(iv)—is constitutional. 205 F.3d at 703-704.

[10] Insofar as petitioner's real claim has to do with Congress's spending priorities, see CAPTF Pet. 24-28, petitioner has no standing to air generalized grievances about those priorities. See *Schlesinger* v. *Reservists Comm. To Stop the War*, 418 U.S. 208 (1974).

agency, provide adequate protection to the public. Pet. App. A9.

3. The court of appeals found that the FCC was not required to prepare an environmental impact statement because the rulemaking process, which extensively considered the environmental effects of RF energy, amounted to "functional compliance" with NEPA; the rulemaking was, the court held, equivalent to an EA and a FONSI. Pet. App. A17-A18. Petitioner Cellular Phone Taskforce contends (Pet. 9-12) that the decision conflicts with decisions of other courts holding that the functional compliance test may lawfully be applied only to actions of the EPA and not to the actions of other federal agencies.

Petitioner's claim is incorrect. No federal regulation, statute, or other source of law prohibits the application of the functional compliance test to agencies other than EPA. The cases cited by petitioner either declined to apply the test to a particular agency or stated in dictum that the test applied only to EPA. None of them held that the test could not be applied in any circumstances to any other agency. There is thus no conflict.

As a matter of policy, the Executive Branch believes that the functional compliance test should not be applied to agencies other than EPA, and the government therefore does not ordinarily argue that environmental analyses conducted by agencies other than EPA functionally comply with NEPA. Because that policy has not been expressed in any formal manner, such as regulation or other publication, the Second Circuit did not commit legal error when it found that the FCC had functionally complied with NEPA. Moreover, in light of the extensive scientific analysis performed by the standard-setting organizations that crafted the FCC's guidelines (as well as the commentary received by the

FCC from pertinent federal agencies, including EPA), the finding below that the FCC had functionally complied with NEPA was supported by the record. Further review of the court of appeals' application in this case of the "functional compliance" test is accordingly not warranted.

In any event, the Second Circuit's judgment was correct for a reason other than the one on which it relied. The court's reasoning on this point implicitly assumes that some kind of environmental analysis was required. We argued before the court of appeals, however, that an agency's promulgation of rules that themselves implement NEPA and determine when an EIS is required, is not subject to the preparation of an EIS. The Seventh Circuit adopted that position in *Heartwood, Inc.* v. *United States Forest Service*, 230 F.3d 947 (2000).

As CEQ has interpreted and implemented NEPA, each federal agency specifies which of its actions will be subject to environmental analysis. 40 C.F.R.1507.3. Under the CEQ's approach, which is "entitled to substantial deference," *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979), an agency's regulations to determine when to prepare an EIS are not themselves subject to the EIS requirement. Rather, such rules are "more like an implementing procedure than a federal action of the type contemplated in 42 U.S.C. § 4332(2)(C)," and the categories specified by the rules "are not proposed actions, [but] categories of actions for which an EA or EIS has been deemed unnecessary." *Heartwood*, 230 F.3d at 953. The rules do not "authoriz[e] any activity or commi[t] any resources to a project that might impact the environment." *Id.* at 954. Accordingly, rules such as the FCC's rules in this case implementing

NEPA are not subject to the requirement that what might be termed a "meta-EIS" must be prepared.

4. Petitioners Worsham, Cellular Phone Taskforce and Fichtenberg contend that Congress impermissibly delegated to the FCC the authority to promulgate the RF exposure rules. Worsham Pet. 14-16; CPT Pet. 18-22; Fichtenberg Pet. 31-32. They claim that Congress articulated no "intelligible principle" to guide the FCC's determination of the issue. The court below did not address that issue, and on that ground further review is therefore not warranted.

In any event, the FCC's authority to promulgate the RF regulations does not violate the Constitution. Congress may delegate its legislative functions to agencies "under broad general directives." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). In delegating its authority, Congress must only "lay down * * * an intelligible principle to which the [agency] is directed to conform" in order for the delegation to be constitutional. *Ibid.* (quoting *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

Petitioners claim that the only congressional delegation of authority to the FCC to craft the RF rules is contained in Section 704(b) of the Telecommunications Act, which states that "[w]ithin 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions." That delegation, they assert, provides constitutionally insufficient guidance.

Petitioners' argument rests on a fundamentally mistaken premise. Section 704 was not the source of the FCC's authority to act in this case, but is instead simply a congressional requirement that the FCC timely resolve an ongoing rulemaking. Indeed, the FCC first

implemented RF rules in 1985, and it began the rulemaking under review three years before the passage of the Telecommunications Act. The agency thus acted under its broad authority to regulate communications conveyed by the Communications Act of 1934.

The FCC issues licenses to use the electromagnetic spectrum pursuant to 47 U.S.C. 307(a), which accords the agency authority to grant licenses "if public convenience, interest, or necessity will be served thereby." Accord 47 U.S.C. 309(a). The public interest standard continues to be the touchstone of FCC regulation. In connection with its licensing function, Congress has granted the FCC the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions" of the Communications Act. 47 U.S.C. 303(r); accord 47 U.S.C. 154(i); 47 U.S.C. 303(f) (1994 & Supp. IV 1998). The Commission also has direct authority to "determine the power which each station shall use," 47 U.S.C. 303(c) and to "[r]egulate the kind of apparatus to be used with respect to its external effects," 47 U.S.C. 303(e). This Court long ago held Congress's expansive delegation of authority to the agency to be constitutional. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943). The Court ruled that the "public interest" standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit." *Id.* at 216 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). Those cases foreclose petitioners' delegation argument.[11]

---

[11] Petitioners CPT and Worsham appear to claim (CPT Pet. 20-21; Worsham Pet. 16) that the decision below conflicts with *American Trucking Ass'ns, Inc.* v. *EPA*, 175 F.3d 1027 (D.C. Cir. 1999),

Petitioner Worsham further asserts (Pet. 14-15) that it violated the delegation doctrine to give the FCC authority to establish standards in a health and safety field in which the agency acknowledged it lacked expertise. That argument is mistaken.

The RF exposure rules govern the activities of entities that are licensed and heavily regulated by the FCC. Congress has charged the FCC with "mak[ing] available * * * a rapid, efficient, Nation-wide, and world-wide wire and radio communications service," 47 U.S.C. 151 (1994 & Supp. IV 1998), has declared it "the policy of the United States to encourage the provision of new technologies and services to the public," 47 U.S.C. 157(a), and has established procedures to ensure the "efficient and intensive use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (Supp. IV 1998). There is a trade-off between those goals and public exposure to RF energy: all risk from RF energy could be eliminated by prohibiting wireless communications technologies. Congress has entrusted to the FCC the process of striking the appropriate balance, a subject squarely within the agency's expertise.

To be sure, the Commission stated that it "does not have the expertise to make independent judgments on such alleged health effects as 'electrosensitivity' or other reported effects on human health. This is the responsibility of the federal health and safety agencies."

---

cert. granted, 120 S. Ct. 2003 (No. 99-1257) and 120 S. Ct. 2193 (No. 99-1426). Those cases involve a substantially different regulatory scheme than does this case, and the resolution of those cases is unlikely to affect the settled analysis of the Communications Act delegation of authority to the FCC, as directly upheld by this Court in cases such as *National Broadcasting Co.* and *Pottsville Broadcasting Co.*

RF Reconsideration Order, 12 F.C.C.R. at 13,538. As the agency acknowledged when it first implemented RF exposure rules, it lacks expertise to "*develop* our own radiation exposure guidelines," but "does have the expertise and authority to *recognize* technically sound standards promulgated by reputable and competent organizations such as ANSI." 100 F.C.C. 2d at 551. Moreover, the FCC consulted extensively with EPA, FDA, OSHA and other federal health and safety agencies, all of which concurred in the final standard. *RF Order*, 11 F.C.C.R. at 15,129-15,131; *RF Reconsideration Order*, 12 F.C.C.R. at 13,538. EPA in particular had been working on its own set of RF exposure rules and it had extensive familiarity with the scientific and medical literature. Pet. App. A10. In short, the RF regulations culminated from a multi-disciplinary, multi-agency effort in which the FCC took the lead. There was no constitutional infirmity in that process.

5. Petitioner Cellular Phone Taskforce claims (Pet. 12-15) that the court below erred in finding that the FCC did not violate the Administrative Procedure Act. CPT argues that during the reconsideration proceeding the FCC was required to solicit the comments of the health and safety agencies on new record material concerning "non-thermal" effects. The court of appeals properly rejected that claim of error.

By the time of its first order, the FCC had already consulted extensively with all of the federal health and safety agencies; the discussions included possible non-thermal effects of RF energy. See Pet. App. A7-A16. Moreover, ANSI and NCRP had reviewed extensive scientific literature on non-thermal effects and found such phenomena not to be supported by the evidence. *Id.* at A9. As the FCC found, no further consultation

was needed: "we have considered carefully well over 150 sets of comments filed in this proceeding and have already consulted extensively with all of the relevant health and safety agencies." *RF Reconsideration Order*, 12 F.C.C.R. at 13,506. As found in an analogous context, "[i]t is not enough that the [new] information may be worthy of further inquiry or may be considered important research. [The question is] whether or not the new information presents a seriously different picture" than that originally envisioned. *Wisconsin* v. *Weinberger*, 745 F.2d 412, 420 (7th Cir. 1984). The court of appeals correctly concluded that "it was reasonable for the FCC to continue to rely on the ANSI and NCRP standards absent new evidence indicating that the fundamental scientific understanding underlying the ANSI and NCRP standards was no longer valid." Pet. App. A9-A10.[12]

---

[12] Petitioner CPT claims (Pet. 15) that it was arbitrary for the FCC to have "eschewed serious health-agency evaluation * * * while simultaneously disclaiming its own expertise." The court below found that the FCC "could reasonably expect [the health and safety] agencies to keep abreast of scientific developments" and "expect the agency with primacy in evaluating environmental impacts to monitor all relevant scientific input into the FCC's reconsideration." Pet. App. A10. Petitioner does not challenge that finding. Indeed, in a letter which we provided to the court of appeals pursuant to Federal Rule of Appellate Procedure 28(j), EPA recently informed the agency that "[t]he information base on non-thermal effects has not changed significantly since the EPA's original comments in 1993 and 1996. * * * The majority of currently available studies suggests * * * that there are no significant non-thermal human health hazards. It therefore continues to be EPA's view that the FCC exposure guidelines adequately protect the public from all scientifically established harms that may result from RF energy fields generated by FCC licensees." Letter from Robert Brenner, Acting Deputy Assistant

Petitioner Fichtenberg raises the additional administrative law claim that the FCC without explanation switched from an earlier RF exposure standard that required exposure to be "as low as reasonably achievable" (ALARA) to the current standards. Fichtenberg Pet. 28-31. Contrary to petitioner's assertion (Pet. 28), ALARA was never the standard; rather petitioner urged that the agency make it the standard.[13] The FCC explained that a very low standard would not strike a proper "balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible." *RF Reconsideration Order*, 12 F.C.C.R. at 13,496. The court below affirmed that finding (Pet. App. A11-A12), and there is no cause to question that conclusion.

6. Finally, petitioner CPT's claim (Pet. 23-25) that the court of appeals improperly rejected its claim under the Rehabilitation Act lacks merit. The argument is that the decision below conflicts with decisions of other courts of appeals that local zoning is a "program or activity" of the relevant governmental unit.

The Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. IV 1998), bars discrimination against or denial of benefits to an "otherwise qualified individual with a disability" on the basis of the handicap "under any

---

Administrator for Air and Radiation to Dale Hatfield, Chief, FCC Office of Engineering and Technology (Apr. 30, 1999).

[13] The requirement of 47 U.S.C. 324 that transmitters "use the minimum amount of power necessary to carry out the communication desired" pertains to interference between stations, not potential health effects of RF fields, which were unknown in 1934 when Section 324 was enacted.

program or activity conducted by any Executive agency." Petitioner claimed below that the proliferation of transmitters was causing discrimination against persons especially sensitive to RF fields. The court of appeals held that "CPT does not allege that electrically sensitive people are being denied the benefit of, or are subject to discrimination under, any 'program or activity' of the FCC," and it dismissed the charge. Pet. App. A25.

That holding was correct. The FCC's regulations implementing the Rehabilitation Act expressly state that the rules do not apply to the "programs or activities of entities that are licensed or certified by the Commission." 47 C.F.R. 1.1830(b)(6). Both this Court and the D.C. Circuit have affirmed that approach. *Community Television of S. Cal.* v. *Gottfried*, 459 U.S. 498 (1983); *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, 840 F.2d 88 (D.C. Cir. 1988).

That reasoning defeats petitioner's contention that the Second Circuit's judgment conflicts with the decision of the Ninth Circuit in *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725 (1999). That case applied the Rehabilitation Act to the zoning activities of a governmental unit. The FCC does not engage in zoning activities, and Congress's preemption of certain aspects of local zoning decisions does not render the FCC a zoning administrator. There is no conflict between the decision under review and that of the Ninth Circuit.[14]

---

[14] Petitioner CPT also raises (Pet. 24-25) a number of procedural complaints about the FCC's alleged failure properly to address petitioner's Rehabilitation Act claims. Those complaints are effectively moot in light of the Second Circuit's decision on rehearing to address petitioner's arguments on the merits and its ruling on

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

CHRISTOPHER J. WRIGHT
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

JOEL MARCUS
Counsel
Federal Communications Commission

DECEMBER 2000

---

the merits that the FCC's orders in this case did not violate the Rehabilitation Act. See Pet. App. A25.

(4)

NO. 00-393

Supreme Court, U.S.
FILED
DEC 4 2000
CLERK

IN THE

Supreme Court of United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and the UNITED STATES OF AMERICA,
Respondents.

On Petition For a Writ Of Certiorari To The United States Court of Appeals For the Second Circuit

BRIEF OF *AMICI CURIAE* PATRICK LEAHY, JAMES JEFFORDS, BERNARD SANDERS, TOM TANCREDO, JEAN ANKENEY, WILLIAM DOYLE, JAMES LEDDY, JANET MUNT, J. WINTHROP SMITH, JR., BRYAN SULLIVANT, DEAN CORREN, DAVID DEEN, RICHARD PEMBROOKE, DAVID ZUCKERMAN, JOHN WITWER, PAUL TONKO, FRANK EGGER, PHIL MENDELSON, CHARLES SANTOS, TOM AMMIANO, VERMONT LEAGUE OF CITIES AND TOWNS, CONNECTICUT RIVER WATERSHED COUNCIL, *et al.*

SENATOR PATRICK LEAHY
Counsel of Record
United States Senate
Washington, D.C. 20510
(202) 224-4242

QUESTION PRESENTED

Whether Congress and the Federal Communications Commission, by requiring State or local zoning authorities to issue, or not issue, building permits for the construction of personal wireless service facilities under specific federal mandates or limitations have thereby commandeered state governmental processes in violation of the Tenth Amendment as interpreted by this Court in *New York v. United States*, 505 U.S. 144 (1992) and *Printz v. United States*, 521 U.S. 898 (1997).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 7

Section 704 of the Telecommunications Act of 1996, and implementing Federal Communications Commission Regulations, are unconstitutional under the 10th Amendment in that they commandeer state and local zoning authorities to approve, or disapprove, building permits under specific federal mandates.

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases:

Petersburg Cellular Partnership v. Board of Supervisors
205 F.3d 688 (4th Cir. 2000). 3,5,8,10

New York v. United States,
505 U.S. 144 (1992) ..... *passim*

Printz v. United States,
521 U.S. 898 (1997) 4,8,9

Statutes:

47 U.S.C. § 332(c)(7) ..... *passim*

BRIEF OF *AMICI CURIAE* PATRICK J. LEAHY AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioners.[1]

INTEREST OF *AMICI CURIAE*

Patrick J. Leahy is a resident of Vermont and represents that state in the Senate of the United States of America, along with Senator James Jeffords. Congressman Bernard Sanders also represents Vermont as a Member of the United States House of Representatives. Congressman Tom Tancredo, represents Colorado as a member of the United States House of Representatives. Additional *amici* are: Jean Ankeney, Vermont State Senator; William Doyle, Vermont State Senator; James Leddy, Vermont State Senator; Janet Munt, Vermont State Senator; J. Winthrop Smith Jr., Connecticut State Senator; Bryan Sullivant, Colorado State Senator; Dean Corren, Vermont State Representative; David Deen, Vermont State Representative; Richard Pembroke, Vermont State Representative; David Zuckerman, Vermont State Representative; John Witwer, Colorado State Representative; Paul Tonko, New York State Assemblyman; Frank Egger, Mayor of Fairfax, California; Phil Mendelson, Washington D.C. Councilmember; Charles Santos, El Cajon, California, Councilmember; Tom Ammiano, San Francisco, California, County Supervisor; the Vermont League of

---

[1]Pursuant to Rule 37 of the Rule of the Court, Petitioners and Respondents have consented to the filing of this brief and their consent letters are filed herewith. No counsel for either party authored this brief amici curiae, either in whole or in part. Furthermore, no persons other than amici curiae contributed financially to the preparation of this brief.

Cities and Towns; the Connecticut River Watershed Council; sixty-eight Vermont cities and towns; and one Colorado city. These federal, state and local representatives are residents of the region which they represent and have an interest in the proper application of federal law nationally, as well as specifically in Vermont, Connecticut, Colorado, New York, California, and the District of Columbia, and thus seek to provide guidance in this matter as friends of this Honorable Court. Further, these towns and officials seek not to be commandeered by the Federal Communications Commission to issue, or not to issue, building permits but instead to be able to protect the interests of residents in the exercise of state control over health, public safety and land use matters through a proper balancing of local interests with a federal goal of promoting more celluar phone service. Petitioners are "Citizens for the Appropriate Placement of Telecommunications Facilities" of Charlotte, Vermont, together with a number of other community citizens organizations and other citizens.

State and local zoning authorities, under principles articulated in *New York v. United States* by this Honorable Court, may not have their processes commandeered to implement a federal policy issued by the Federal Communications Commission which seeks to override local control over health, safety and local land use issues regarding the siting of personal wireless services facilities (PWSF), such as cell phone towers, by compelling an outcome determined by the Congress – the mandatory issuance, or non-issuance, of local construction permits if certain federal conditions are met. As is carefully articulated in an opinion by the Honorable Judge Niemeyer regarding the siting of a cellular phone tower in Nottoway County, Virginia, "the imposition of that federal standard [the federal tower siting provision at issue in this matter, i.e. 47 U.S.C. § 332(c)(7)(B)] on the [zoning] Board commandeers its legisla-

tive process, and thus the [provision] is unconstitutional."[2] *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d at 706 (4th Cir. 2000).

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to urge the Court to grant the Petition for Writ of Certiorari.[3] We respectfully urge that the Court of Appeals decision be reversed as inconsistent with principles articulated by this Court in *New York v. United States* and by the Fourth Circuit in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) and that 47 U.S.C. § 332(c)(7)(B) be declared unconstitutional. The authority of the Federal Communications Commission to commandeer the actions of local zoning authorities and mandate that they issue, or not issue, building permits precludes such local authorities from exercising power regarding health, safety and local land use issues and is not consistent with the Tenth Amendment of the United States Constitution. Review is also sought to resolve the direct conflict between the Second Circuit decision and a recent opinion by Fourth Circuit Judge Niemeyer in *Petersburg*, 205 F.3d 688.

---

[2]Judge Widener concurred in the order of Judge Niemeyer to reverse and remand the case to the district court with instruction to vacate its writ of mandamus but for different reasons. Judge Niemeyer determined that 47 U.S.C. § 332(c)(7)(B)(iii) [reprinted in Appendix A-30 of the petition for writ of certiorari submitted by Whitney North Seymour, Jr., for petitioners, Docket No. 00-393] is unconstitutional under the 10th Amendment.

[3]The amici in this matter commend fellow petitioners for writs of certiorari: David Fichtenberg, petitioner, pro se, of Olympia, Washington; Michael C. Worsham, petitioner, pro se, of Forest Hill, Maryland; and Cellular Phone Taskforce, Arthur Firstenberg and Richard Targow, Counsel of Record. The amici on this brief urge this Honorable Court to carefully consider the additional points brought out in those petitions.

This case is thus a challenge to the Constitutionality of section 704(a) of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)) and to the implementing regulations of the Federal Communications Commission.[4] In *New York v. United States*, 505 U.S. 144 (1992), this Court determined that under the Tenth Amendment, Congress could not directly compel states to pass legislation or carry out a federal regulatory program to address the critical problem of the shortage of hazardous radioactive waste disposal sites.[5] In this matter Congress enacted legislation regarding the siting of cellular phone towers that imposed conditions and limitations on State or local zoning authorities designed to carry out federal goals. For example, under 47 U.S.C. § 332(c)(7)(B) State or local zoning authorities may not refuse to issue a permit if doing so would "prohibit or have the effect of prohibiting the provision of personal wireless service," nor can such authorities refuse to act "on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality...," and any local decision must be "in writing and supported by substantial evidence contained in a written record."

---

[4]The Vermont Congressional delegation filed a brief amici curiae supporting a petition for a writ of certiorari in a case involving the siting of a radio broadcast tower containing cellular phone facilities in the town of Charlotte, Vermont (Graeme Freeman, et al., v. Burlington Broadcasters, Inc., et al, 2000 U.S. Lexis 6516, October 2, 2000) in which the petition for certiorari was recently denied. Tenth Amendment issues were raised in that brief but the major argument presented was that Congress did not provide the Federal Communications Commission with any authority to preempt local and state authority over the siting of radio broadcast towers and further that towns have the authority to enforce zoning agreements made before construction of a radio broadcast tower with the owner of the radio broadcast tower who subsequently violated those agreements in the operation of tower facilities.

[5]Also see *Printz v. United States*, 521 U.S. 898 (1997).

Basically, section 332(c)(7)(B), and the FCC implementing regulations, flatly mandate that State or local zoning authorities implement several federal requirements or limitations regarding the issuance of building permits. It is this type of direct commandeering of state functions which was found to be unconstitutional in *New York v. U.S.* (regarding nuclear waste sites) by this Court and unconstitutional in *Petersburg*, (regarding the siting of cellular phone towers) by the Fourth Circuit.

Section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)), is an attempt to compel State or local zoning officials to address the alleged public policy problem (as determined by the Congress and the Federal Communications Commission) regarding the shortage of personal wireless services facilities (PWSF) even when granting building permits for additional PWSF in some circumstances would be inconsistent with state decisions designed to protect the health and safety of local residents.

In general, *amici* urge that this issue is of great importance because of the dramatic increase in the siting, construction and use of telecommunications and radio towers in communities throughout the United States.[6] The location of such towers near homes, schools, farms, churches, hospitals, airports, highways, and the whole host of work and home environments is of great importance to the States, to local governments and citizens. There is significant concern by homeowners living near potential tower sites regarding financial harm they would suffer from reductions in the value of their property if the towers were to be

---

[6]Note, Wireless Facilities Are A Towering Problem, 40 Wm. & Mary L. Rev. 975, 979 (1999).

built.[7]

In addition, there is growing public and scientific concern over the adverse effects of radio frequency emissions emanating from cellular phone facilities and, of course, there have been many newspaper articles about car accidents involving drivers talking on a cell phone.[8] Also, it is our understanding that, while the FCC has established standards for the "thermal effects" from such radiation the FCC has not issued emission standards based on non-thermal biological effects at below-heating levels which may cause biological harm.[9]

Amici urge that the United States Constitution delineates,

---

[7]See note 6 and "Cell Towers Are Sprouting in Unlikely Places," *The New York Times*, January 9, 2000 (fears that property values could drop between 5 and 40 percent because of neighboring cell towers); "Quarrel over Phone Tower Now Court's Call," *Chicago Tribune*, January 18, 2000 (fear of lowered property values due to cell tower); "The Future is Here, and It's Ugly: a Spreading of Techno-blight of Wires, Cables and Towers Sparks a Revolt," *New York Times*, September 7, 2000; "GTE Wireless Loses Lawsuit over Cell-phone Tower," *The Houston Chronicle*, February 23, 1999 (property values depreciate by about 10 percent because of the tower); "Tower Plan Ripped," *Anchorage Daily News*, December 3, 1999 (tower could lower property values).

[8]Mark Alpert, "Biophysics–Radiation Hazards: Worrying About Wireless," *Scientific American*, p. 20-21. (September 2000) This article discusses animal studies on the possible carcinogenic effects of cell phone radiation. Indeed, maximum emission standards set by many other countries throughout the world are more protective – lower – than FCC permitted levels. See pages 9 and 10 of the Petition for Writ of Certiorari, Whitney North Seymour, Jr., Counsel of Record, Docket No. 00-393.

[9]For example, the United Kingdom Independent Expert Group on Mobile Phones, commissioned by the British Government, recommended that children under age sixteen be discouraged from using cell phones in a report issued on April 28, 2000 (available at http://www.iegmp.org.uk). That report also recommends that cell phone antenna not be built near schools, hospitals and residences. Also see note 8.

in many instances, the respective roles of the federal government, the States, or the people, and that granting the petition for writ of certiorari in this matter will allow this Honorable Court to ensure that the priciples set fourth in *New York v. United States* are properly applied by the Congress and the Federal Communications Commission with respect to the sovereign states regarding issues of public health and safety, and local land use decisions.

ARGUMENT

SECTION 704 OF THE TELECOMMUNICATIONS ACT OF 1996, AND IMPLEMENTING FEDERAL COMMUNICATIONS COMMISSION REGULATIONS, ARE UNCONSTITUTIONAL UNDER THE 10TH AMENDMENT IN THAT THEY COMMANDEER STATE AND LOCAL ZONING AUTHORITIES TO APPROVE, OR DISAPPROVE, BUILDING PERMITS UNDER SPECIFIC FEDERAL MANDATES.

Amici urge that the United States Constitution and federal law establishes a balancing system within which states, and local governments, through the exercise of local health and safety powers, and certain powers over the use of land, have a significant role in the location, construction and use of these PWSF except in certain circumstances where Congress has specifically provided otherwise in a manner consistent with the United States Constitution.

However, the Constitution and its Tenth Amendment does not permit the Congress to destroy this partnership of the Federal government (the Federal Communications Commission, in this matter) with the sovereign states and does not allow local or state processes to be commandeered to blindly imple-

ment the federal goal of promoting more cellular phone service in the face of plenary police powers held by the states.

The Framers of the Constitution "designed a system in which the state and federal governments would exercise concurrent authority over the people – who were, in Hamilton's words, 'the only proper objects of government.'" *Printz v. U.S.*, 521 U.S. at 919-20 (quoting The Federalist No. 15). Indeed this Court has pointed out that the "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states." *New York v. U.S.*, 505 U.S. at 166.

Fourth Circuit Judge Niemeyer noted that the provision in question, part of section 704 of the Telecommunications Act of 1996 (47 U.S.C. § 332(c)(7)(B)(iii)), commandeers the "County's legislative process and is therefore unconstitutional under the Tenth Amendment." *Petersburg*, 205 F.3d at 705 (concur. op.). That provision was declared constitutionally fatal, in that State or local zoning officials must accept the siting of a PWSF unless the zoning authority denies a request in a particular manner – "in writing and supported by substantial evidence contained in a written record."

Section 704(a), codified at 47 U.S.C. § 332(c)(7)(B)(the "Limitations" part of the paragraph), imposes several specific duties on State or local governments or their instrumentalities. These mandates include that the State or local government (normally a zoning authority): (1) may not deny a permit if that has the "effect of prohibiting the provision of personal wireless service"; (2) must issue denials of a permit "in writing and supported by substantial evidence contained in a written record"; and (3) may not delay any permit decision beyond a "reasonable time."

State and local authority over land use and over the health

and safety of its citizens is a primary responsibility of state and local governments under our federal system. This Court noted in *New York v. U.S.*, regarding nuclear waste sites that: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. U.S.*, 505 U.S. at 166. In this matter regarding cellular tower sites, Congress and the FCC attempt to compel certain actions or prohibit certain actions of State and local zoning authorities under Federal conditions. Yet, under our Constitution, Congress may not "conscript state governments as its agents." *Id.* at 178.

CONCLUSION

For the foregoing reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari concerning the Constitutionality of 47 U.S.C. § 332(c)(7)(B). We agree with Judge Niemeyer in his application of the principles set forth in opinions of this court – in *New York v. U.S.* and *Printz v. U.S.* – to the Constitutionality of the same federal provision in question in this matter (47 U.S.C. § 332(c)(7)(B)) regarding the siting of a cellular phone tower in Nottoway County, Virginia.

In his decision, Judge Niemeyer writes:

> However, in the area of regulating the location of communications facilities, Congress was understandably reluctant to assert its preemption rights to deprive state and local governments of their important zoning and permit authority. It recognized that erecting telecommunications towers is of significant local interest and can be controversial due to both rational and irrational

> concerns of residents in the community. Moreover, preserving local legislative processes would make local officials accountable for land use decisions. Yet, Congress did not wish to cede control over the implementation of its policy of promoting the erection of communications facilities to localities that were often hostile to such facilities. Thus, through a compromise involving a partial preemption approach, it enacted § 704(a) of the Telecommunications Act, imposing federal standards on state and local legislative processes, thus leaving state and local legislative boards responsible and accountable for any fall-out in making siting decisions. Through this blend of assigned power, Congress apparently believed it could effect a federal policy promoting the erection of telecommunications towers, while preserving local interests in the process. But this particular blend erases the constitutional lines dividing power between the federal and state sovereigns and therefore becomes a categorical violation of the Tenth Amendment.

Petersburg, 205 F.3d 705-06.

We respectfully urge this Court to hear this matter by granting the petition for Writ of Certiorari for Docket 00-393.

Respectfully Submitted,
PATRICK J. LEAHY
Counsel of Record
United States Senator
United States Senate
Washington, D.C. 20510
(202) 224-4242

James M. Jeffords, United States Senator
Bernard Sanders, Member of Congress
Tom Tancredo, Member of Congress
Jean Ankeney, Vermont State Senator
William Doyle, Vermont State Senator
James Leddy, Vermont State Senator
Janet Munt, Vermont State Senator
J. Winthrop Smith Jr., Connecticut State Senator
Bryan Sullivant, Colorado State Senator
Dean Corren, Vermont State Representative
David Deen, Vermont State Representative
Richard Pembroke, Vermont State Representative
David Zuckerman, Vermont State Representative
John Witwer, Colorado State Representative
Paul Tonko, New York State Assemblyman
Frank Egger, Mayor of Fairfax, California
Phil Mendelson, Washington D.C. Councilmember
Charles Santos, El Cajon, California,
Councilmember
Tom Ammiano, San Francisco, California,
County Supervisor
Vermont League of Cities and Towns
Connecticut River Watershed Council
City of Golden, Colorado
Town of Addison, Vermont
City of Barre, Vermont
Town of Barton, Vermont
Town of Bennington, Vermont
Town of Bloomfield, Vermont
Town of Braintree, Vermont
Town of Brighton, Vermont
Town of Brookline, Vermont
Town of Cabot, Vermont
Town of Canaan, Vermont
Town of Cavendish, Vermont

Town of Charlotte, Vermont
Town of Chelsea, Vermont
Town of Colchester, Vermont
Town of Dorset, Vermont
Town of East Montpelier, Vermont
Town of Fair Haven, Vermont
Town of Georgia, Vermont
Town of Glover, Vermont
Town of Grand Isle, Vermont
Town of Hancock, Vermont
Town of Hardwick, Vermont
Town of Hartford, Vermont
Town of Highgate, Vermont
Town of Holland, Vermont
Town of Killington, Vermont
Town of Lemington, Vermont
Town of Lyndon, Vermont
Town of Marlboro, Vermont
Town of Mendon, Vermont
Town of Middlebury, Vermont
Town of Middlesex, Vermont
Town of Mount Holly, Vermont
Town of Newbury, Vermont
Town of Newfane, Vermont
Town and Village of Northfield, Vermont
Town of Norwich, Vermont
Town of Orwell, Vermont
Town of Pawlet, Vermont
Town of Peru, Vermont
Town of Pittsford, Vermont
Town of Plainfield, Vermont
Town of Richford, Vermont
Town of Richmond, Vermont
Town of Rochester, Vermont
Town of Roxbury, Vermont

City of Rutland, Vermont
Town of Sandgate, Vermont
Town of Shoreham, Vermont
City of South Burlington, Vermont
City of St. Albans, Vermont
Town of Stamford, Vermont
Town of Starksboro, Vermont
Town of Swanton, Vermont
Town of Tinmouth, Vermont
Town of Walden, Vermont
Town of Washington, Vermont
Town of Waterbury, Vermont
Town of Weathersfield, Vermont
Town of Westminster, Vermont
Town of West Windsor, Vermont
Town of Weybridge, Vermont
Town of Whiting, Vermont
Town of Whitingham, Vermont
Town of Williston, Vermont
Town of Windsor, Vermont
City of Winooski, Vermont
Town of Worcester, Vermont

Supreme Court, U.S.
FILED
DEC 4 2000
CLERK

(5)

No. 00-393

In the
SUPREME COURT OF THE UNITED STATES

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONCORD CITIZENS FOR RESPONSIBLE TOWER SITING, *et al.* AS AMICI CURIAE IN SUPPORT OF PETITIONERS

William R. Malone
(Counsel of Record)
James R. Hobson
Miller & Van Eaton, PLLC
1155 Connecticut Ave., #1000
Washington, D.C. 20036-4306
(202) 785-0600

October 2000

4 cpp

TABLE OF CONTENTS

Consent to File.....1

Interest of Amici.....1

Summary of Argument.....4

Argument.....5

1. Section 704 unlawfully conscripts state governments. 7

(a) Federal licensing does not supplant local zoning. 8

(b) Where radio frequency radiation is an issue, local zoning choice is nullified or seriously diminished. 10

2. Local zoning authorities consider themselves foreclosed from protecting constituents against perceived threats from radio frequency radiation. 11

3. The Court below improperly ignored First Amendment issues altogether. 19

Conclusion.....20

Appendix.....A1

TABLE OF AUTHORITIES

Cases:

Cellular Tel. Co. v. Zoning Bd. of Adjustment, 197 F.3d 64 (3d Cir. 1999).....10

FERC v. Mississippi, 456 U.S. 742 (1982).....7

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).....7

City of Madison Joint Sch. Dist .No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976).....20

New York v. United States, 505 U.S. 144 (1992)...5, 6, 8, 18

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S 37 (1983).....20

Printz v. United States, 521 U.S. 898 (1997).....6, 8

Town of Amherst v. Omnipoint Communications Enterprises, 173 F.3d 9 (1st Cir. 1999).....10

Other:

Communications Act of 1934, as amended, 47 U.S.C. § 332 (c)(7)(B)(iv)(2000).....4

Telecommunications Act of 1996
Section 704.....4

47 C.F.R. § 1.1307(b), (c).....9

47 C.F.R. § 1.1310 9

47 C.F.R. § 22.163 9

47 C.F.R. § 22.165 9

47 C.F.R. § 24.809(b) 9

Liakouris, Ana G. Johnson, 53 *Archives of Environmental Health*, No. 3 (May/June 1998) 13

Concord Journal, November 20, 1997 11

The Daily Gazette, Friday, August 7, 1998 12

The New Mexican, March 27, 2000, page A-4 17

CONSENT TO FILE

Consent for the filing of this brief in support of Petitioner has been granted by all parties. Pursuant to Rule 37.2(a), their written consents are appended.[1]

INTEREST OF AMICI

Concord Citizens for Responsible Tower Siting ("CCRTS") is an informal association of persons who live in the Town of Concord, Massachusetts. For the past three years, CCRTS members have worked within the Concord Town Meeting, and with the Town Planning Board, on issues related to the zoning of sites for cellular telephone and PCS wireless facilities.

CCRTS is joined in this brief by the groups and individuals listed below. (CCRTS and supporters shortened to "CCRTS Amici")

Communications Workers of America, AFL-CIO ("CWA"), a party in the Second Circuit below, is a national labor union concerned with the health and safety of its workers who install, maintain and repair personal wireless service facilities.

Chico Citizens for Community Justice (C) is an informal association of residents of the named California city who have opposed placement of wireless facilities in or near residential areas by Pacific Bell Wireless and AT&T Wireless.

---

[1] Pursuant to Rule 37.6, no counsel for a party authored any part of this brief. Financial contributors other than CCRTS are marked by "(C)" following their names.

Jimmy Cunningham (C) is a resident of Lincoln, Massachusetts concerned about the siting of a 90-foot personal wireless service tower near the home of his parents which mounts a flashing red light because of its location in a helicopter fly-zone.

Duanesburg Citizens Group is an ad hoc association of residents of Duanesburg, New York living near a 250-foot tower erected by Cellular One in late 1996 and asserting severe detriment to their health from the multiple personal wireless service antennas mounted on the tower.

Garfield-Hyde Park Neighbors Alliance (C) has been active in developing a zoning bylaw in Hyde Park, Vermont.

Bonnie S. Hicks is a resident of Mishawaka, Indiana who has been active in opposing placement of wireless service towers in her community. Having spoken against a zoning application by Sprint (dba "Bright PCS"), she has been summoned as an "adverse party" to appear in St. Joseph County Circuit Court in Sprint's challenge to the denial of its application. (Cause Nos. 71C01 0010 CP 01457 and CP 01458)

Josephine Collins Jacob (C) of Deer Isle, Maine supports the work of CCRTS.

Lexington Coalition (C) is an informal association of persons living in and around the Town of Lexington, Massachusetts formed to oppose the installation of antennas on a church steeple adjacent to The Waldorf School.

Marblehead Cancer Prevention Project (C), based in Marblehead, Massachusetts, is an informal association of persons concerned about carcinogens and carcinogenic agents in the human environment. Among other recognition,

the Project received in September, 1998 the Annual Community Service Award of the Marblehead Chamber of Commerce.

Neighborhood Preservation Alliance (C) is an association of Philadelphia residents concerned with the detrimental aesthetic and health effects of personal wireless facilities antennas in the Roxborough/Manayunk areas of the City.

Neighbors Opposing Towers is an informal association of residents of Orlando, Florida and environs which opposed placement of a cellular service monopole antenna in the modified steeple of a suburban church housing a child development center and day care and infant care facilities.

Pacific Palisades Methodist Preschool vs Metricom (C) is an informal association of citizens formed in the California community of Pacific Palisades out of concern for the siting of wireless antennas -- in the bell tower of a church housing the preschool -- by the data and internet access provider, Metricom.

Rural Arizonans for a Microwave Antenna-Free Environment (C), based in Snowflake, supports CCRTS.

Santa Fe Citizens Task Force on Microwave Antennas (C) is an informal association of 800 New Mexico residents who have petitioned against the siting of wireless service towers in residential districts.

Robert P. and Martha M. Bryson and Charles Landon of San Diego, California; Munster Community Watch of Munster, Indiana; and Lou Ann Grabowski of La Grange Highlands, Illinois also support CCRTS. Other groups and

individuals supporting CCRTS are mentioned and quoted in Section 2 of the Argument.

Beyond their personal fears arising from the known and unknown effects of radio frequency radiation ("RFR") on human beings, the CCRTS Amici also are motivated by their frustrations as citizens attempting to work with or to influence the elected and appointed officials of their communities in the siting of cellular telephone and PCS facilities. Because many of these officials refuse to entertain any discussion of RFR, even within the bounds of the federal preemption, the CCRTS Amici join with Petitioner, Citizens for the Appropriate Placement of Telecommunications Facilities ("CAPTF"), in urging the Court to review the constitutionality of Section 332(c)(7)(B)(iv) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(7)(B)(iv) (2000).[2]

SUMMARY OF ARGUMENT

Section 704 of the Telecommunications Act of 1996, by adding subparagraphs 7(B)(ii) and (iv) to Section 332(c) of the Communications Act of 1934, as amended, encroaches impermissibly upon the powers reserved to the states under the Tenth Amendment. While leaving most zoning legislation and adjudication to local authorities, the statute effectively conscripts these authorities by compelling them to grant any wireless siting application if denial would carry the slightest taint of RFR concerns.

As documented by the testimony in this brief, many citizens fear that their health and safety are not adequately

---

[2] Reproduced at A29-30 of Petitioner's Brief as Section 704 of the Telecommunications Act of 1996.

protected under the federal radiation standard. Local governments often are confronted with the unpalatable alternatives of denying a wireless facilities application opposed by their constituents or risking litigation from the disappointed applicant. No matter how they choose, these officials cannot escape the brunt of public disapproval for an outcome not in their control. Some municipalities have gone so far as to ban or restrict discussion of the radiation standard altogether. The federal government is essentially insulated from this mounting local unrest.

Petitioners below argued that restrictions on the content of discussion at zoning hearings were violations of the First Amendment rights of citizens to speak freely and to petition for redress of grievances. The Court below brushed aside the First Amendment arguments, despite the close scrutiny demanded of restraints on political speech.

ARGUMENT

In *New York v. United States*, 505 U.S. 144 (1992), this Court held invalid a federal statute requiring states either to adopt regulations controlling the disposal of privately-generated radioactive waste or to assume ownership of the dangerous material. The Court declared, 505 U.S. at 178:

> No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript

state governments as its agents.

Conversely, where a state is able to forgo adoption of its own regulatory program, and to substitute a federal regime validly adopted under the Commerce Clause, there is no unconstitutional encroachment on the powers reserved to it under the Tenth Amendment.

The statute challenged here fails this test of choice. Section 704 is not a federal substitute for local zoning of personal wireless service facilities. Instead, it effectively compels municipal planners and land-use decision-makers, acting "in their official capacities as state officers,"[3] to approve any personal wireless facilities site where the effects of RFR on human health and safety are at issue.

The testimony below of concerned citizens from around the country fulfills, emphatically, this Court's prediction that "where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval." *New York v. United States*, 505 U.S. at 169.

Seeming to fear litigation more than public disapproval, however, some local zoning authorities have deemed it necessary, in light of FCC warnings, to suppress political speech about the environmental effects of RFR. Thus their unlawful conscription as agents of the federal government is compounded by the unlawful infringement of their constituents' freedom to speak and to petition for redress of grievances.

---

[3] *Printz v. United States*, 521 U.S. 898, 930 (1997).

1. Section 704 unlawfully conscripts state governments.

As Petitioner CAPTF points out (Pet. Br., 4-7), Congress wanted Section 704 of the Telecommunications Act of 1996 to speed the deployment of personal wireless service facilities without substituting a federal program for local zoning procedures. The legislation thus differed markedly from the Surface Mining and Control Act of 1977 upheld in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). The new law also differed from *FERC v. Mississippi*, 456 U.S. 742 (1982) because the federal limits on local zoning were to be mandatory, not merely suggestive.

In *Hodel*, national controls on surface coal mining, as an exercise of Congressional authority to regulate interstate commerce, did not violate the Tenth Amendment because they (1) were directed at private individuals and not at states, and (2) offered a choice of a state program meeting minimum federal standards or "adoption of a federal program for any state that chooses not to submit a program." 452 U.S. at 288.

Similarly, in *FERC v. Mississippi*, the Public Utility Regulatory Policies Act of 1978 preserved states' choices by requiring them to "consider," but not necessarily to adopt, certain federal recommendations for regulating the retail rates of electricity and natural gas. 456 U.S. at 765.

By contrast, the language of Section 704 is compulsory. A local zoning authority "shall act" on an application to place, construct or modify a personal wireless facility, but must ignore the environmental effects of RFR "to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions."

The Court below disagreed that the effect of this language was to "commandeer local authorities to administer a federal program" contrary to the Tenth Amendment teachings of *New York* and *Printz*:

> State and local governments are not required to approve or prohibit anything. The only onus placed on state and local governments exercising their local power is that they may not regulate personal wireless service facilities that conform to the FCC Guidelines on the basis of environmental effects of RF radiation.

Pet. Br. A-21. The Court's view might be acceptable if the environmental effects of RF radiation were the sole criterion for disposition of the zoning application. Effectively, a federal program would have been substituted for the local process. But that is not what Congress did.

To the contrary, Congress affirmatively left in municipal hands the application of most land-use criteria affecting the siting of radio antennas. As long as local authorities act within general federal limits of fairness, promptness and record evidence, they are expected to rule on such conventional zoning considerations as aesthetics, suitability of a site's use, structural safety of towers, etc. They must decide. There is no federal program to substitute for local or state laws and regulations.

(a) Federal licensing does not supplant local zoning.

As cellular telephone systems have been built out and the industry has matured from its first licensing in the early 1980s, the Federal Communications Commission ("FCC")

has streamlined its regulations to eliminate prior federal approval of minor system modifications or of "internal" transmitters whose addition does not significantly extend the boundaries of the serving area. 47 C.F.R. §§ 22.163 and 22.165 (1998). When broadband PCS emerged in the 1990s, with its higher frequencies transmitting shorter distances and requiring more radio antennas, the FCC provided for blanket licensing in preference to approval of individual sites. 47 C.F.R. § 24.809(b) (1998).[4]

Moreover, the structure of the environmental regulations controlling RFR is to presume – through "categorical exclusions" – that most cellular and PCS facilities comply. The rules rely on carrier-administered "environmental assessment" to remedy non-compliance at the license application stage. 47 C.F.R. §§ 1.1307(b), 1.1310. The only sure recourse for citizens seeking to overcome these presumptions of compliance is to measure for excessive electromagnetic fields or power densities after a transmitter begins operation, and to complain through Section 1.1307(c).[5] Thus, the federal licensing program for personal wireless facilities is nothing like the site-specific review in the local zoning process.

---

[4] Sections 22.163 and 24.809 later were consolidated into current Sections 1.913 and 1.929.

[5] The cited RFR rules are reproduced in the Appendix to this brief. At oral argument below, FCC Counsel acknowledged that accurate measurements are only made by expensive and sophisticated equipment beyond the capabilities of most citizens, but that such measurements "would certainly be the best evidence to present to the agencies." (Tr. 37-38).

(b) Where radio frequency radiation is an issue, local zoning choice is nullified or seriously diminished.

One acceptable basis for declining a wireless facilities application is the availability of alternate sites.[6] Another is the conclusion that no "significant gap" in wireless service will be filled by the facility applied for.[7] Local zoning authorities have come to weigh such factors routinely in fulfilling the land-use obligations left with them by Congress under Section 704(a). But these common-sense considerations are off-limits if RFR concerns are present.

Local officials faced with an RFR issue might prefer to find another site – an industrial zone, say, instead of a school or hospital or residential area. They might wish to question whether a minor improvement in wireless phone coverage – often requiring a particular antenna location – is worth the perceived threat of placement near a home for the elderly.

But the language of the statute has proven too intimidating. To turn down an application on the basis of RFR effects, even if only in pursuit of an alternative site, is to risk a lawsuit from the applicant. Such effects may not be the

---

[6] *Town of Amherst v. Omnipoint Communications Enterprises,* 173 F. 3d 9 (1st Cir. 1999).

[7] *Cellular Tel. Co. v. Zoning Bd. of Adjustment,* 197 F.3d 64 (3d Cir. 1999).

paramount or prevailing reason for the decision, but if they are perceived as even a small part of the denial, litigation is a likely result.

The FCC has warned that a "local zoning decision that appeared from the record to be based upon concerns over RF emissions" might be preempted under the statute and the agency's rules "even if the local zoning board did not specifically say so in its decision."[8]

Faced with this dilemma, many local planning and zoning boards have simply refused to deny applications where RFR is an issue. Some have gone further and refused to permit citizens to speak on the subject at all. Effectively, these municipal authorities have been conscripted to ignore, and even to silence, the health and safety concerns of their constituents. The unhappy result is illustrated in the following section.

2. Local zoning authorities consider themselves foreclosed from protecting constituents against perceived threats from radio frequency radiation.

CCRTS member Virginia Hines writes that in Massachusetts "our Town Boards feared court action by the providers

> if there were an indication that these [RF] concerns entered into the decision whether or not to permit the construction of such a facility or in the adoption of a zoning

---

[8] Procedures for Reviewing Requests for Relief from State and Local Regulations, 12 FCC Rcd 13494, 13549 (1997).

amendment addressing such facilities.[9]

The fear proved well founded. After Ms. Hines spoke of RFR concerns at a Concord Town Meeting, the Town adopted a zoning bylaw making no reference to RFR. Nevertheless, AT&T Wireless sued to overturn the legislation. The case is pending.[10]

In Duanesburg, New York, the Town Planning Board's approval of the addition of 12 Bell Atlantic (now Verizon) wireless antennas to a 250-foot tower owned by another carrier, Cellular One, so enraged John Proper, a member of the Duanesburg Citizens Group, that he was reported to have "stood and screamed, 'If any health problems arise, it's on your head'." State police were called to the scene, but no arrests were made.[11] In a declaration

---

[9] Declaration of April 9, 1998. A contemporary newspaper account of a meeting of the Concord Town Planning Board quotes the Board Chairman as saying "there would be no discussion of adverse environmental or health effects" in the Board's consideration of a zoning bylaw amendment on tower siting. *Concord Journal,* November 20, 1997, at 1. The declarations of Ms. Hines and other CCRTS Amici spokespersons are in the form of an unsworn statement "to the best of my information and belief." Sworn testimony is identified as such. CCRTS Amici respectfully ask the Court to accord such weight to this informal and formal evidence as is proper under its rules, and to take judicial notice of documented litigation.

[10] *AT&T Wireless PCS, Inc., d/b/a AT&T Wireless Services v. Town of Concord, Massachusetts, et al.*, No. 99CV-11866RWZ (D. Mass).

[11] Michael DeMasi, Tower anger flares at Duanesburg meeting, *The Daily Gazette*, Friday, August 7, 1998. According to the paper, police had also been called to a Board meeting six months earlier, reportedly responding to a confrontation between Town Supervisor William Park and another Citizens Group member, Lawrence Stankavich.

dated October 6, 2000, Citizens Group members Lawrence Stankavich and his wife, Susan, recount that they have complained since April 1997, before the addition of the Bell Atlantic antennas, of "ill medical health effects" they believe are caused to them and their neighbors by the proximity of the tower's transmitters to their homes. The effects included severe headaches, allergies, asthma, tumors, night sweats, fibromyalgia, severe back pain and chronic nose bleeds.[12] According to the Stankaviches:

> Our Town and Planning Boards continually referred to the Telecommunications Act of 1996 and claimed their hands were tied . . . The Town and Planning Board[s] declared they feared court action by the providers. In fact, they approved a co-location application by Bell Atlantic after a court ruling to return to the Planning Board for further review.

Marybeth Meek of El Cajon, California wrote on October 6, 2000 to describe hair loss and fevers suffered by her daughter and her own migraine disorder, fibromyalgia and sleeplessness which she believes to be caused by antennas mounted on a water tower near her home. According to her letter:

---

[12] The appearance and recurrence of symptoms such as these have led researchers to ask whether radiofrequency radiation sickness syndrome is a medical entity. Ana G. Johnson Liakouris, 53 *Archives of Environmental Health*, No. 3 (May/June 1998) The syndrome has achieved a degree of popular currency through the Johns Hopkins Foreign Service Health Status study ("Lilienfeld Study") examining effects of alleged Soviet microwave irradiation of the U.S. Embassy in Moscow, 1953-76.

> The city said it sympathized with us on all our concerns, but none the less would be required to approve the conditional use permit because they could not turn the cellular communications companies down second to the protections they received from the Telecommunications Act of 1996.

Writing on October 5, 2000 for the Garfield/Hyde Park (Vermont) Neighbors Alliance, Dennis Clancy declared that in a public hearing to consider new zoning bylaws, attorneys for interested wireless carriers "threatened that any provisions in the zoning bylaw that ignored the prohibitions set forth in the Telecommunications Act of 1996 would inevitably lead to lawsuits against the Town."

In losing the battle over antennas near The Waldorf School, a School parent, clinical psychologist Dr. George Eastman, concluded in a statement of October 8, 2000 that he and the Lexington Coalition

> felt unreasonably constrained by at least four factors: (1) the power given to the FCC in the 1996 Telecommunications Act to preempt state and local authority in matters of public health, safety and welfare, (2) the intimidating threat of court action by wireless companies such as Nextel against towns and citizens, (3) the degree to which accurate information regarding the health hazards of PCS technology is upstaged by paid industry advocates who misinform the public, (4) the absence of objective, government (not industry) funded research.

The founder of the Marblehead Cancer Prevention Project, Linda Weltner, declares that when the Town Planning Board opposed placement of a Sprint antenna on a high school flag pole, the Board "was threatened with a law suit and complied with its placement only because of that threat." Ms. Weltner continues:

> The head of the Planning Board stated in a public meeting that they feel they are prevented from making health-based decisions about any of these issues because of the preemption of their power by Section 704 of the Telecommunications Act.

In Philadelphia, Pennsylvania, the Director of Construction Codes Compliance for the City's Department of Licenses and Inspections twice during 1999 wrote to a member of the Neighborhood Preservation Alliance, David K. O'Neil, that the Department "has no regulatory powers concerning alleged threats to health or environment from radio frequency emissions" and referred the Alliance to the FCC. According to O'Neil's declaration of October 6, 2000, the local Zoning Board of Adjustment extended the scope of Section 704 by applying it to broadcast tower siting:

> Furthermore, we were prohibited from entering testimony about the adverse health effects on the community in regards to two new 1,000 foot broadcast towers that were approved in June of 2000 by Philadelphia's Zoning Board of Adjustment.

Martha Mellor Bryson of San Diego, California declares in a letter of October 5, 2000 that in her battle "to keep a cellular telephone antenna farm from intruding into my residential neighborhood," she

> continued in fear that at some time during a public presentation I might slip and mention my health concerns. I was informed by the President of the Ocean Beach Planning Board that if I did slip and express my well-founded fears and concerns that my testimony would be struck and might invalidate the entire plea to keep the antennae farm out of my neighborhood.

The Santa Fe Citizens Task Force on Microwave Antennas represents some 800 citizens of Santa Fe, New Mexico who have signed petitions against the placement of wireless transmitters in residential areas. According to a declaration of October 3, 2000 by Task Force members Merida Blanco and Janet Degan:

> However, when we have tried to express our concerns in City hearings during the permitting process, we have been instructed not to speak . . . about any concerns we may have regarding our health or safety. The City Attorney has advised us that if we as citizens voice our concerns in any City hearings, U.S. West and/or other Telecommunications Corporations will claim the right to sue the City of Santa Fe, under the Telecommunications Act of 1996.
>
> * * *
>
> The Telecommunications Act of 1996 has effectively eliminated Local Zoning Boards' ability not only to respond to citizen concerns – but literally to hear them. If the

> Corporations have free reign [sic] to use our residential neighborhoods for their profits, and we cannot legally petition our governments for protection of our health and safety, or for redress of grievances, we are left with no recourse but civil disobedience.[13]

Testimony of this kind also appeared in the record below. An affidavit from Janet Newton of Cabot, Vermont declared that officials in her Town advised her and her husband that

> there could be no discussion in the record on environmental or health concerns for fear of a court challenge by any provider that decisions were even indirectly based on health or environmental concerns.[14]

Since the preparation of Ms. Newton's testimony, one of those Cabot officials, Caleb Pitkin, has submitted a supporting affidavit dated October 7, 2000, and stating, in part:

> Our [Planning] Commission and Selectboard decided that it would not allow discussion or testimony pertaining to health, safety, quality

---

[13] A newspaper report of the debate quoted City Attorney Peter Dwyer: "The federal government said, 'We'll have that debate in Washington. You can't have it in Santa Fe'." The report continued: "Dwyer said he sympathizes with the wary neighbors, but the health issue is simply taboo." *The New Mexican*, March 27, 2000, page A-4.

[14] Joint Brief of Petitioners Ad-Hoc Association and Communications Workers of America, May 22, 1998, Exhibit A.

> of life or environmental effects of radio-frequency radiation . . . [because] the courts or the FCC might rule our proposed zoning amendment invalid.

Another local official, Holly Fournier of Charlotte, Vermont, testified on the record below of her frustrating inability to address constituents' health and safety concerns related to RFR.[15]

It is important to note that the Hines (Town of Concord), Clancy (Hyde Park) and Blanco/Degan (City of Santa Fe) declarations and the Pitkin affidavit quoted above relate expressly to legislative functions of their respective governments. Thus they recall the warning in *New York v. United States* that "no Member of the Court has ever suggested that such a [strong] federal interest would enable Congress to command a state government to enact state regulation." 505 U.S. at 178. They also underline the Court's concern that

> where the Federal Government directs the states to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

505 U.S. at 169.

The citizen testimony above transforms the conditional language of the *New York* opinion into a

---

[15] Joint Reply Brief of Petitioners Ad-Hoc and CWA, July 27, 1998, Exhibit A.

declarative description of reality. There should be no doubt that local zoning staff and elected officials are "bear[ing] the brunt of public disapproval" while the FCC effectively is insulated, by the nature and structure of its rules, from examining wireless applications site by site and case by case.

3. The Court below improperly ignored First Amendment issues altogether.

Two petitioners below, Ad-Hoc Association and CWA, argued that

> From the face of the statute, discussion of RFR concerns at public hearings ought to be acceptable for the minimal purpose of evaluating compliance with FCC standards. To the contrary, however, citizens at some meetings have been denied altogether the chance to speak to the topic.

(Joint Brief, May 22, 1998, 68.) The FCC responded that the local officials were only exercising their legitimate authority to control the agendas of public meetings and to exclude irrelevant matter. Beyond that, said the agency, aggrieved citizens could sue for violation of their rights. (FCC Brief, July 14, 1998, 43-44) On reply, petitioners asked the Court to clarify that the preemptive language of Section 704 did not limit discussion for the purpose of eliciting an applicant's compliance with federal RFR standards. They contended that the FCC's warning against any such discussion (note 8, *supra*) amounted to government suppression of protected speech in violation of the First Amendment. (Joint Reply Brief, July 27, 1998, 37-38)

The Court below addressed only the Tenth Amendment claims of Petitioners and brushed aside the First

Amendment challenge simply as "without merit." (Pet. Br., A-21). That was surprising in light of this Court's teachings about content-based restrictions on speech,[16] especially political speech.[17] In light of the declarations and affidavits discussed above, invoking not only freedom of speech but also redress of grievances, the CCRTS Amici ask this Court to review whether a complete ban on RFR debate at public zoning hearings offends the Constitution.

CONCLUSION

For the reasons discussed above, the CCRTS Amici urge the Court to grant the Petition for Certiorari of the Citizens for the Appropriate Placement of Telecommunications Facilities, *et al.*

Respectfully submitted,

William R. Malone
(Counsel of Record)
James R. Hobson
Miller & Van Eaton, PLLC
1155 Connecticut Ave., #1000
Washington, D.C. 20036-4306
(202) 785-0600

October 2000

---

[16] *City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations. Comm'n*, 429 U.S. 167, 176 (1976). ("When the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . the content of their speech.").

[17] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S 37, 45 (1983) (State must show that "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

APPENDIX

TITLE 47--TELECOMMUNICATION CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION PART 1--PRACTICE AND PROCEDURE--Table of Contents Subpart I--Procedures Implementing the National Environmental Policy Act of 1969

Sec. 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

(a) Commission actions with respect to the following types of facilities may significantly affect the environment and thus require the preparation of EAs by the applicant (see Secs. 1.1308 and 1.1311) and may require further Commission environmental processing (see Secs. 1.1314, 1.1315 and 1.1317):

(1) Facilities that are to be located in an officially designated wilderness area.

(2) Facilities that are to be located in an officially designated wildlife preserve.

(3) Facilities that: (i) May affect listed threatened or endangered species or designated critical habitats; or (ii) are likely to jeopardize the continued existence of any proposed endangered or threatened species or likely to result in the destruction or adverse modification of proposed critical habitats, as determined by the Secretary of the Interior pursuant to the Endangered Species Act of 1973.

Note: The list of endangered and threatened species is contained in 50 CFR 17.11, 17.22, 222.23(a) and 227.4. The list of designated critical habitats is contained in 50 CFR 17.95, 17.96 and part 226. To ascertain the status of

proposed species and habitats, inquiries may be directed to the Regional Director of the Fish and Wildlife Service, Department of the Interior.

(4) Facilities that may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places. (See 16 U.S.C. 470w(5); 36 CFR 60 and 800.)

Note: The National Register is updated and re-published in the Federal Register each year in February. To ascertain whether a proposal affects a historical property of national significance, inquiries also may be made to the appropriate State Historic Preservation Officer, see 16 U.S.C. 470a(b); 36 CFR parts 63 and 800.

(5) Facilities that may affect Indian religious sites.

(6) Facilities to be located in a flood Plain (See Executive Order 11988.)

(7) Facilities whose construction will involve significant change in surface features (e.g., wetland fill, deforestation or water diversion). (In the case of wetlands on Federal property, see Executive Order 11990.)

(8) Antenna towers and/or supporting structures that are to be equipped with high intensity white lights which are to be located in residential neighborhoods, as defined by the applicable zoning law.

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities, require

the preparation of an Environmental Assessment (EA) if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation in excess of the limits in Secs. 1.1310 and 2.1093 of this chapter. Applications to the Commission for construction permits, licenses to transmit or renewals thereof, equipment authorizations or modifications in existing facilities must contain a statement confirming compliance with the limits unless the facility, operation, or transmitter is categorically excluded, as discussed below. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(1) The appropriate exposure limits in Secs. 1.1310 and 2.1093 of this chapter are generally applicable to all facilities, operations and transmitters regulated [[Page 284]] by the Commission. However, a determination of compliance with the exposure limits in Sec. 1.1310 or Sec. 2.1093 of this chapter (routine environmental evaluation), and preparation of an EA if the limits are exceeded, is necessary only for facilities, operations and transmitters that fall into the categories listed in table 1, or those specified in paragraph (b)(2) of this section. All other facilities, operations and transmitters are categorically excluded from making such studies or preparing an EA, except as indicated in paragraphs (c) and (d) of this section. For purposes of table 1, building-mounted antennas means antennas mounted in or on a building structure that is occupied as a workplace or residence. The term power in column 2 of table 1 refers to total operating power of the transmitting operation in question in terms of effective radiated power (ERP), equivalent isotropically radiated power (EIRP), or peak envelope power (PEP), as defined in Sec. 2.1 of this chapter. For the case of the Cellular Radiotelephone Service, subpart H of part 22 of this chapter; the Personal Communications Service, part 24 of

this chapter and the Specialized Mobile Radio Service, part 90 of this chapter, the phrase total power of all channels in column 2 of table 1 means the sum of the ERP or EIRP of all co- located simultaneously operating transmitters owned and operated by a single licensee. When applying the criteria of table 1, radiation in all directions should be considered. For the case of transmitting facilities using sectorized transmitting antennas, applicants and licensees should apply the criteria to all transmitting channels in a given sector, noting that for a highly directional antenna there is relatively little contribution to ERP or EIRP summation for other directions.

Table 1--Transmitters, Facilities and Operations Subject to Routine Environmental Evaluation

Service (title 47 CFR rule part)	Evaluation required if
Experimental Radio Services (part 5). Multipoint Distribution Service (subpart K of part 21).	Power > 100 W ERP (164 W EIRP) Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP MDS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable

	FCC- adopted limits for radiofrequency exposure specified in Sec. 1.1310.
Paging and Radiotelephone Service (subpart E of part 22).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1000 W ERP (1640 W EIRP) Building-mounted antennas: power > 1000 W ERP (1640 W EIRP)
Cellular Radiotelephone Service (subpart H of part 22).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: total power of all channels > 1000 W ERP (1640 W EIRP)
Personal Communications Services): (part 24).	(1) Narrowband PCS (subpart Dnon-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: total power of all channels > 1000 W ERP (1640 W EIRP) (2) Broadband PCS (subpart E): non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 2000 W ERP (3280 W EIRP) Building-mounted antennas: total power of

	all channels > 2000 W ERP (3280 W EIRP)
Satellite Communications (part 25).....	All included.
General Wireless Communications Service (part 26).	Total power of all channels > 1640 W EIRP
Wireless Communications Service (part 27).	Total power of all channels > 1640 W EIRP
Radio Broadcast Services (part 73)...	All included

[[Page 285]]

Table 1 – Transmitters, Facilities and Operations Subject To Routine Environmental Evaluation - Continued

Service (title 47 CFR rule part)	Evaluation required if
Experimental, auxiliary, and special broadcast and other program distributional services (part 74).	Subparts A, G, L: power > 100 W ERP Subpart I: non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP ITFS licensees are required to attach a label to subscriber transceiver or transverter antennas that: (1) provides adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the

	safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC-adopted limits for radiofrequency exposure specified in Sec. 1.1310.
Stations in the Maritime Services (part 80).	Ship earth stations only
Private Land Mobile Radio Services Paging Operations (part 90).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and power > 1000 W ERP (1640 W EIRP) Building-mounted antennas: power > 1000 W ERP (1640 W EIRP)
Private Land Mobile Radio Services Specialized Mobile Radio (part 90).	Non-building-mounted antennas: height above ground level to lowest point of antenna 10 m and total power of all channels > 1000 W ERP (1640 W EIRP) Building-mounted antennas: Total power of all channels > 1000 W ERP (1640 W EIRP)
Amateur Radio Service (part 97).....	Transmitter output power > levels specified in Sec. 97.13(c)(1) of this chapter
Local Multipoint Distribution Service: (subpart L of part 101).	Non-building-mounted antennasheight above ground level to lowest point of antenna 10 m and power > 1640 W EIRP Building-mounted antennas: power > 1640 W EIRP LMDS licensees are required to attach a label to subscriber transceiver antennas that: (1) provides

adequate notice regarding potential radiofrequency safety hazards, e.g., information regarding the safe minimum separation distance required between users and transceiver antennas; and (2) references the applicable FCC- adopted limits for radiofrequency exposure specified in Sec. 1.1310 of this chapter

(2) Mobile and portable transmitting devices that operate in the Cellular Radiotelephone Service, the Personal Communications Services (PCS), the Satellite Communications Services, the General Wireless Communications Service, the Wireless Communications Service, the Maritime Services (ship earth stations only) and the Specialized Mobile Radio Service authorized under subpart H of parts 22, 24, 25, 26, 27, 80, and 90 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in Secs. 2.1091 and 2.1093 of this chapter. Unlicensed PCS, unlicensed NII and millimeter wave devices are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in Secs. 15.253(f), 15.255(g), and 15.319(i) and 15.407(f) of this chapter. All other mobile, portable, and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure under Secs. 2.1091 and 2.1093 of this chapter except as specified in paragraphs (c) and (d) of this section.

(3) In general, when the guidelines specified in Sec. 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed transmitters, actions necessary to bring the area into compliance are the shared

responsibility of all licensees whose transmitters produce, at the area in question, power density levels that exceed 5% of the power density exposure limit applicable to their particular transmitter or field strength levels that, when squared, exceed 5% of the square of the electric or magnetic field strength limit applicable to their particular transmitter. Owners of transmitter sites are expected to allow applicants and licensees to take reasonable steps to comply with the requirements contained in Sec. 1.1307(b) and, where feasible, should encourage co-location of transmitters and common solutions for controlling access to areas where the RF exposure limits contained in Sec. 1.1310 might be exceeded. [[Page 286]]

(i) Applicants for proposed (not otherwise excluded) transmitters, facilities or modifications that would cause non-compliance with the limits specified in Sec. 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's transmitter or facility would result, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter or facility.

(ii) Renewal applicants whose (not otherwise excluded) transmitters or facilities contribute to the field strength or power density at an accessible area not in compliance with the limits specified in Sec. 1.1310 must submit an EA if emissions from the applicant's transmitter or facility results, at the area in question, in a power density that exceeds 5% of the power density exposure limit applicable to that transmitter or facility or in a field strength that, when squared, exceeds 5% of the square of the electric or magnetic field strength limit applicable to that transmitter of facility.

(4) Transition Provisions. Applications filed with the Commission prior to October 15, 1997 (or January 1, 1998, for the Amateur Radio Service only), for construction permits, licenses to transmit or renewals thereof, modifications in existing facilities or other authorizations or renewals thereof require the preparation of an Environmental Assessment if the particular facility, operation or transmitter would cause human exposure to levels of radiofrequency radiation that are in excess of the requirements contained in paragraphs (b)(4)(i) through (b)(4)(iii) of this section. In accordance with Sec. 1.1312, if no new application or Commission action is required for a licensee to construct a new facility or physically modify an existing facility, e.g., geographic area licensees, and construction begins on or after October 15, 1997, the licensee will be required to prepare an Environmental Assessment if construction or modification of the facility would not comply with the provisions of paragraph (b)(1) of this section. These transition provisions do not apply to applications for equipment authorization or use for mobile, portable and unlicensed devices as specified in paragraph (b)(2) of this section.

(i) For facilities and operations licensed or authorized under parts 5, 21 (subpart K), 25, 73, 74 (subparts A, G, I, and L), and 80 of this chapter, the ``Radio Frequency Protection Guides" recommended in ``American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz", (ANSI C95.1-1982), issued by the American National Standards Institute (ANSI) and copyright 1982 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York shall apply. With respect to subpart K of part 21 and subpart I of part 74 of this chapter, these requirements apply only to multipoint distribution service and instructional television fixed service stations transmitting with an equivalent

isotropically radiated power (EIRP) in excess of 200 watts. With respect to subpart L of part 74 of this chapter, these requirements apply only to FM booster and translator stations transmitting with an effective radiated power (ERP) in excess of 100 watts. With respect to part 80 of this chapter, these requirements apply only to ship earth stations.

(ii) For facilities and operations licensed or authorized under part 24 of this chapter, licensees and manufacturers are required to ensure that their facilities and equipment comply with IEEE C95.1-1991 (ANSI/ IEEE C95.1-1992), ``Safety Levels With Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, ``Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields--RF and Microwave." Copies of these standards are available from IEEE Standards Board, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331. Telephone: 1-800-678-4333. The limits for both ``controlled" and ``uncontrolled" environments, as defined by IEEE C95.1-1991, will apply to all PCS [[Page 287]] base and mobile stations, as appropriate.

(iii) Applications for all other types of facilities and operations are categorically excluded from routine RF radiation evaluation except as provided in paragraphs (c) and (d) of this section.

(5) Existing transmitting facilities, devices and operations: All existing transmitting facilities, operations and devices regulated by the Commission must be in compliance with the requirements of paragraphs (b)(1) through (b)(3) of this section by September 1, 2000, or, if not in compliance, file an Environmental Assessment as specified in Sec. 1.1311.

(c) If an interested person alleges that a particular action, otherwise categorically excluded, will have a

significant environmental effect, the person shall submit to the Bureau responsible for processing that action a written petition setting forth in detail the reasons justifying or circumstances necessitating environmental consideration in the decision-making process. (See Sec. 1.1313). The Bureau shall review the petition and consider the environmental concerns that have been raised. If the Bureau determines that the action may have a significant environmental impact, the Bureau will require the applicant to prepare an EA (see Secs. 1.1308 and 1.1311), which will serve as the basis for the determination to proceed with or terminate environmental processing.

(d) If the Bureau responsible for processing a particular action, otherwise categorically excluded, determines that the proposal may have a significant environmental impact, the Bureau, on its own motion, shall require the applicant to submit an EA. The Bureau will review and consider the EA as in paragraph (c) of this section.

(e) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions. For purposes of this paragraph:

(1) The term personal wireless service means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(2) The term personal wireless service facilities means facilities for the provision of personal wireless services;

(3) The term unlicensed wireless services means the offering of telecommunications services using duly authorized devices which do not require individual licenses,

but does not mean the provision of direct- to-home satellite services; and

(4) The term direct-to-home satellite services means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

[51 FR 15000, Apr. 22, 1986, as amended at 52 FR 13241, Apr. 22, 1987; 53 FR 28224, July 27, 1988; 53 FR 28393, July 28, 1988; 54 FR 30548, July 21, 1989; 55 FR 2381, Jan. 24, 1990; 55 FR 50692, Dec. 10, 1990; 61 FR 41014, Aug. 7, 1996; 62 FR 3240, Jan. 22, 1997; 62 FR 4655, Jan. 31, 1997; 62 FR 9654, Mar. 3, 1997; 62 FR 23162, Apr. 29, 1997; 62 FR 47965, Sept. 12, 1997; 62 FR 61448, Nov. 18, 1997; 63 FR 65099, Nov. 25, 1998]

Effective Date Note: At 63 FR 65099, Nov. 25, 1998, Sec. 1.1307, Table 1, was amended. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

* * *

Sec. 1.1310 Radiofrequency radiation exposure limits.

The criteria listed in table 1 shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in Sec. 1.1307(b), except in the case of portable devices which shall be evaluated according to the provisions of Sec. 2.1093 of this chapter. Further information on evaluating compliance with these limits can be found in the FCC's OST/OET Bulletin Number 65, ``Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation."

Note to Introductory Paragraph: These limits are generally based on recommended exposure guidelines published by the National Council on Radiation Protection and Measurements (NCRP) in ``Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86, Sections 17.4.1, 17.4.1.1, 17.4.2 and 17.4.3. Copyright NCRP, 1986, Bethesda, Maryland 20814. In the frequency range from 100 MHz to 1500 MHz, exposure limits for field strength and power density are also generally based on guidelines recommended by the American National Standards Institute (ANSI) in Section 4.1 of ``IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz," ANSI/IEEE C95.1-1992, Copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017.

Table 1--Limits for Maximum Permissible Exposure (MPE)

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm \2\)	Averaging time (minutes)
(A) Limits for Occupational/Controlled Exposures				
0.3-3.0.	614	1.63	*(100)	6
3.0-30	1842/f	4.89/f	*(900/f)	6
30-300	61.4	0.163	1.0	6
300-1500	--	--	f/300	6
1500-100,000	--	--	5	6

(B) Limits for General Population/Uncontrolled Exposure

0.3-1.34	614	1.63	*(100)	30
1.34-30	824/f	2.19/f	*(180/f)	30
30-300	27.5	0.073	0.2	30
300-1500	--	--	f/1500	30
1500-100,000	--	--	1.0	30

f = frequency in MHz
* = Plane-wave equivalent power density
Note 1 to Table 1: Occupational/controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/controlled exposure also apply in situations when an individual is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential for exposure.

Note 2 to Table 1: General population/uncontrolled exposures apply in situations in which the general public may be exposed, or in which persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or can not exercise control over their exposure.

Supreme Court, U.S.
FILED
DEC 15 2000
OFFICE OF THE CLERK

(6)

No. 00-393

In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, et al. IN SUPPORT OF CERTIORARI

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001-3904
(212) 629-0590

* *Counsel of Record*

10 pp

TABLE OF CONTENTS

	Page
REPLY STATEMENT	1
REPLY ARGUMENT	
POINT	
RESPONDENTS NEVER SQUARELY ADDRESS PETITIONERS' CONSTITUTIONAL ARGUMENTS	4
CONCLUSION	7

TABLE OF AUTHORITIES

Page(s)

Cases:

Alden v. Maine, 527 U.S. 706 (1999) 5

Cellular Telephone Co. v. Town of Oyster Bay, 166 F.3d 490 (2d Cir. 1999) 4, 5

Gillespie v. City of Indianapolis, 185 F.3d 693 (7th Cir. 1999) 6

New York v. United States, 505 U.S. 144 (1992) 4

Petersburg Cellular Partnership v. Board of Supervisors, 205 F.3d 688 (4th Cir. 2000) 5

Printz v. United States, 521 U.S. 898 (1997) 4

Statutes:

47 U.S.C. 332(c)(7)(B)(iv) 5

REPLY BRIEF OF CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, et al. IN SUPPORT OF CERTIORARI

Petitioners CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.* ("CAPTF") submit this brief in reply to those portions of respondents FEDERAL COMMUNICATIONS COMMISSION ("FCC") and UNITED STATES OF AMERICA's consolidated opposition brief ("Resp. Br.") which address CAPTF's petition.

REPLY STATEMENT

This case challenges the constitutionality of the Telecommunications Act of 1996 and FCC implementing regulations. The Act and regulations violate the Tenth Amendment by requiring state and local government to enforce Federal regulatory standards which fail to protect citizens from the potential — and increasingly noted — harmful health effects of radiation emitted from wireless communication towers.

As described by respondents, the actions of Congress and the FCC would appear to be perfectly reasonable and responsible — *until one examines them closely*. It then becomes clear that despite going through the motions of consultation with various federal agencies (Resp. Br. at 4), the FCC wholly failed to address a crucial aspect of cell tower environmental safety — the *non-thermal* biological effects of radio frequency radiation ("RF"). The FCC made no effort to address the mounting evidence that such non-thermal effects are a grave health concern.[1] (*See* CAPTF Pet. at 7-10, 24.) This conspicuous gap in

---

[1] As recently as November 25, 2000, Reuters News Service carried the following news dispatch concerning the effects of radio frequency radiation at the same frequencies as those constantly emitted from cell towers:

the federal scheme allows the unchecked flow of potentially harmful public exposure to radio frequency radiation. Respondents state that there is a trade-off between the goals for the rapid deployment of communications and public exposure to RF energy. (Resp. Br. at 21.) In weighing public exposure to RF energy it is not enough that the new information may be worthy of further inquiry or may be considered important research. (Resp. Br. at 23.) The question is whether or not the new information presents a seriously different picture than originally envisioned. The original picture adopted by ANSI, NCRP and the FCC was that the only adverse effect of this radiation on people was that it *heated* human tissue. A measured amount of energy added to a system results in a predictable and measurable response, *i.e.*, tissue heating, and nothing more. Protecting people from this radiation simply required that the levels be prevented from being intense enough to overheat people.

The "seriously different picture" that respondents continue to miss is that credible research reports on RF radiation bioeffects document physiological changes other than heating in living organisms caused by this radiation and that effects of long-term chronic exposure may be cumulative. Large electromagnetic radiation increases are a new and growing factor

---

> LONDON, Nov. 25 (Reuters) — Children who use mobile phones risk suffering memory loss, sleeping disorders and headaches, according to research published in the medical journal The Lancet.
>
> Physicist Dr. Gerard Hyland raised new fears over radiation caused by mobile phones and said under 18-year-olds, who represent a quarter of Britain's 25 million mobile users, were more vulnerable because their immune systems were less robust.
>
> "Radiation is known to affect the brain rhythms and children are particularly vulnerable," Hyland said.

These findings simply cannot be disregarded.

in this environment to which living creatures respond in a myriad of ways across a range of frequencies and intensities well below the threshold of "thermal effects." In balancing the rapid deployment of communications using increasing amounts of RF emissions, the FCC *assumes* that this deployment will not harm humans and has made a choice to take a risk that the assumption of no [adverse] effects at non-thermal levels is correct. Despite severely restricted funding (indeed, no further funding of RF research at the EPA), numerous independent studies do indicate actual biological changes caused by this form of radiation. The FCC assumes that the old research based entirely on short-term studies can safely be applied to conclude that long-term continuous exposure to these levels of non-ionizing RF radiation would not harm people.

The citizens have a right to be heard on how much risk they are willing to accept by having a voice in their local governments. Because local governments are not permitted under the Act and regulations to take these concerns into account, citizens are being subjected to an unauthorized experiment on the adequacy of the FCC assumptions against their will, and have lost their voice in local government decisions.

State and local governments cannot be required to enforce such a flawed scheme against their own citizens, without violating the Tenth Amendment.

REPLY ARGUMENT

POINT

RESPONDENTS NEVER SQUARELY ADDRESS PETITIONERS' CONSTITUTIONAL ARGUMENTS

Nearly lost amid the arguments in respondents' opposition brief is the fact that this is a *constitutional case involving fundamental issues of federalism* and *a categorical violation of the Tenth Amendment*. (*See* CAPTF Petition, Point I.) Indeed, the Solicitor General largely sidesteps the actual constitutional arguments raised in the Petition. For example, with respect to petitioner's primary constitutional argument, respondents simply parrot the Second Circuit's incorrect view that the Telecommunications Act of 1996 "does not commandeer the processes of state and local zoning authorities because it does not compel those bodies to do anything at all." (Resp. Br. at 14.) Nowhere do respondents acknowledge the contrary fact pointed out in petitioners' brief, *i.e.*, that under the Act, local municipalities are routinely *required to approve construction of wireless facilities*. (CAPTF Petition at 17-18, *citing inter alia*, *Cellular Telephone Co. v. Town of Oyster Bay*, 166 F.3d 490 (2d Cir. 1999).) This compulsion transforms the statute from a routine preemption of state and local "legislative choices" (*cf.* Resp. Br. at 15) into a categorically unconstitutional "commandeering" of local governments "by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992); *see also Printz v. United States*, 521 U.S. 898, 933 (1997). (*See* CAPTF Pet. at 14-20.)

It is simply irrelevant to argue — as respondents do — that the statute "leaves intact all *other traditional bases* for land-use regulation," apart from public health. (Resp. Br. at 14.) (Emphasis added.) The fact remains that where a municipality wishes to deny a cell tower permit based on potential health

effects on the community, and no legitimate grounds exist for denying the application for aesthetic, historic or other non-health reasons, the *municipality is compelled by the Act to approve construction.* (*See Town of Oyster Bay*, 166 F.3d at 497.) That is the fatal constitutional defect of the statute which compromises the federal system of dual sovereignty. (*See* CAPTF Pet. at 14-15.) While the Federal government devised the controversial emission standards, it is the *local government* which must put its stamp of approval on such cell tower construction and be exposed to the political consequences. The Federal government evades all accountability. *Id.*

Respondents are equally off base in their response to Petitioners' constitutional argument based on this Court's decision in *Alden v. Maine*, 527 U.S. 706 (1999). (*See* Resp. Br. at 16 asserting that petitioners' argument "has nothing to do" with *Alden*.) Respondent's cite the *specific* holding of *Alden* regarding state sovereign immunity (Resp. Br. at 16) but ignore the *general constitutional principle* upon which the decision is based. That principle is that the Federal government may not infringe upon the "residuary and inviolable sovereignty" retained by the states. (517 U.S. at 715.) Based on *Alden*, petitioners assert that the primary power and duty of state government under such "inviolable sovereignty" is to protect citizens from threats to life and health. (*See* CAPTF Pet., Point II.) The Telecommunications Act and FCC implementing regulations are unconstitutional because they *violate* this *inviolable* power.

Respondents also argue that Judge Niemeyer in *Petersburg Cellular Partnership v. Board of Supervisors*, 205 F.3d 688 (4th Cir. 2000) actually endorsed the constitutionality of 47 U.S.C. 332(c)(7)(B)(iv). (Resp. Br. at 16, n.9.) However, the constitutional reasoning of Judge Niemeyer's opinion fully supports CAPTF's position — as pointed out in the Petition. (*See* CAPTF Petition at 17, n.10.) The conflict with the

Second Circuit decision is therefore undeniable and certiorari should be granted to reconcile this split in the circuits.

Finally, for the first time in this case, respondents suggest that there is "a question" about petitioners' standing to raise the Tenth Amendment issues here. (Resp. Br. at 13, n.7.) That question is answered in the *affirmative* by a case cited in respondents' own brief, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 700-703 (7th Cir. 1999), *cert denied*, 120 S.Ct. 934 (2000) finding that a private citizen has standing to challenge a statute on Tenth Amendment grounds. Moreover, CAPTF's position has been expressly endorsed by over seventy municipalities who have filed amici curiae briefs in support of the petitioners. *See e.g.*, Amici Curiae Brief of Towns of Islip, Brookhaven, Smithtown, Huntington and Oyster Bay, Long Island; Amici Curiae Brief of Town of Lincoln, Mass and Lincoln Planning Board; and Amici Curiae Brief of the Vermont delegation.[2]

---

[2] Contrary to respondents' suggestion, petitioners are not airing "generalized grievances" regarding Congressional spending policies. (*See* Resp. Br. at 16, n. 10.) Rather, the meager appropriations for FCC, EPA and other federal research into the health and biological effects of non-thermal radiation explain why the FCC standards are outdated and inadequate and why the Second Circuit's unquestioning confidence in them was naive and misplaced. (*See* CAPTF Pet. at 24-28.) In sharp contrast to the U.S. failure to fund research into potential health and biological effects from non-thermal radiation emissions from mobile phones and towers, on December 8, 2000, Great Britain's Department of Health announced a comprehensive research program to cost several million pounds. The agency said that "any research undertaken must be independent and scientifically rigorous." (*See* http://www.doh.gov.uk/mobile.htm) The full report on which the British government research program is founded is available on the Internet at http://www.iegmp.org.uk/IEGMPtext.htm.

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, New York
December 14, 2000

WHITNEY NORTH SEYMOUR, JR.*
PETER JAMES CLINES
LANDY & SEYMOUR
Attorneys for Petitioners
363 Seventh Avenue, Room 1300
New York, New York 10001-3904
(212) 629-0590

* *Counsel of Record*

DEC 4 2000

(1)

Supreme Court, U.S.
FILED
DEC 4 - 2000
CLERK

No. 00-393

IN THE

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF TELECOMMUNICATIONS FACILITIES, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[redacted] THE TOWN OF LINCOLN, MASSACHUSETTS AND THE LINCOLN PLANNING BOARD FOR [redacted] BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICI CURIAE*

JOEL B. BARD
Counsel of Record
PATRICIA A. CANTOR
KOPELMAN AND PAIGE, P.C.
Attorneys for Amici Curiae Lincoln, Massachusetts and the Lincoln Planning Board
31 St. James Avenue
Boston, MA 02116
(617) 556-0007

162852

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

1480

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Town of Lincoln, Massachusetts, Planning Board ("Planning Board") hereby moves, pursuant to Rule 37.2 of the Supreme Court of the United States, for leave to file a brief as *amicus curiae* in support of the petition for writ of certiorari, No. 00-93, to the United States Court of Appeals for the Second Circuit. The Planning Board is filing this motion for leave to join in the *amicus curiae* brief filed by the Town of Lincoln, Massachusetts ("Lincoln" or "Town") and does not seek to file a separate, additional brief. Since Lincoln is a town and its brief is submitted by its authorized law officer, the Board of Selectmen, under Rule 37.4 of the Court leave of the Town to file an *amicus curiae* brief is not required. A copy of the Town's brief is attached.

As explained in the Town's brief, the Planning Board is the entity responsible under state law, the Massachusetts Zoning Act, Mass. Gen. Laws ch. 40A, and local by-laws for developing land use policy in Lincoln. Since 1997, Lincoln and particularly its Planning Board have actively worked to develop and implement policy in the Town regarding the Telecommunications Act of 1996, Section 407, 47 U.S.C. § 332(c)(7). While the Lincoln Town Meeting is the legislative body which ultimately adopts or rejects specific local land use regulations ("by-laws"), the Planning Board is the entity which develops planning policies and recommends specific by-laws. Mass. Gen. Laws, ch. 40A, § 5.

The petition for writ of certiorari requests review of a provision of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv), which bars a state or local governmental instrumentality from making a decision regarding a wireless communications facility based upon "the environmental

effects of radio frequency emissions" so long as the facility complies with Federal Communications Commission "regulations concerning such emissions." As stated in the Town's brief, hearings before the Planning Board focused on facts and issues related to this statutory provision. Town's Brief, pp. 3-5. The information described in the Town's brief was first brought to the attention of town officials through the Planning Board hearing process. The Planning Board, therefore, is uniquely positioned to bring these matters before the Court. Permitting the Planning Board to join the *amicus curiae* brief of the Town does not burden judicial resources because the Planning Board is not asking to file an independent brief but merely to join the brief of the Town. The Planning Board did not request the consent of all the parties prior to the filing of this motion because it interpreted Rule 37.4 as including the Planning Board within the provision allowing a "city, county, town, or similar entity" to file an *amicus curiae* brief without consent of the parties or leave of court.

The Planning Board respectfully requests that it be granted leave to file the attached brief.

Respectfully submitted,

JOEL B. BARD
Counsel of Record
PATRICIA A. CANTOR
KOPELMAN AND PAIGE, P.C.
Attorneys for Amici Curiae
Lincoln, Massachusetts and
the Lincoln Planning Board
31 St. James Avenue
Boston, MA 02116
(617) 556-0007

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the Amici Curiae	1
Lincoln's Response to the Telecommunications Act of 1996 and its Efforts to Regulate Wireless Communications Facilities	3
Reasons for Granting the Writ	6
Conclusion	8

TABLE OF CITED AUTHORITIES

Page

Cases:

Aegerter v. City of Delafield, 174 F.3d 886 (7th Cir. 1999) 6

Alden v. Maine, 527 U.S. 706 (1999) 7

Cellular Phone Taskforce v. FCC, 205 F.3d 82 (2d Cir. 2000) 1, 8

Illinois RSA No. 3, Inc. v. County of Peoria, 963 F. Supp. 732 (C.D. Ill. 1997) 6

Omnipoint Communications, Inc. v. City of Scranton, 36 F. Supp. 2d 222 (M.D. Pa. 1999) 6

Omnipoint Communications MB Operations, Inc. v. Town of Lincoln, 107 F. Supp. 2d 108 (D. Mass. 2000) 4, 6, 7

Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000) 6, 7, 8

Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc., 173 F.3d 9 (1st Cir. 1999) 6

Cited Authorities

Page

Statutes:

47 U.S.C. § 332(c)(7) 1

47 U.S.C. § 332(c)(7)(B)(iv) 1, 4

Mass. Gen. Laws ch. 40A 1

United States Constitution:

Tenth Amendment 7, 8

INTEREST OF THE AMICI CURIAE[1]

The Town of Lincoln, Massachusetts ("Lincoln"), is a municipal subdivision of the Commonwealth of Massachusetts. Lincoln is a suburban, semi-rural community located approximately sixteen miles from Boston. The Lincoln Planning Board ("Planning Board") is the entity responsible under state law, the Massachusetts Zoning Act, Mass. Gen. Laws ch. 40A, and local by-laws for developing land use policy in Lincoln.

Since 1997, Lincoln and its Planning Board, in response to the Federal Telecommunications Act of 1996, Section 704, 47 U.S.C. § 332(c)(7), have been developing and implementing a local zoning by-law to effectuate the intent of the statute regarding the placement of personal wireless services facilities in the Town consistently with state law and traditional land use planning considerations.[2] Lincoln and its Planning Board are very concerned about the interpretation of 47 U.S.C. § 332(c)(7)(B)(iv) by the Federal Communications Commission ("FCC"), which was upheld by the Circuit Court of Appeals for the Second Circuit in *Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir. 2000), which is the subject of the pending petition for writ of certiorari. This interpretation precludes the town from considering any evidence regarding health effects of radio

---

1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici or its counsel, have made a monetary contribution to the preparation or submission of the brief.

2. For convenience, Lincoln uses the term cellular towers or wireless communications facilities ("WCF") to refer to "personal wireless services facilities" under the statute.

frequency emissions on the residents of the town. Such preclusion, in turn, seriously interferes with the ability of town officials to protect the residents of Lincoln from potentially harmful radiation where the federal government has abdicated its regulatory role in this regard. *See* Petition for Writ of Certiorari, pp. 7, *et seq*.

The issue presented by the petition for writ of certiorari is of great concern to Lincoln because the fundamental question of the relationship between the federal government and local regulatory authorities is at stake. The Lincoln Town Meeting, which is the legislative branch of town government, voted on March 28, 1998:

> That it is the sense of this Meeting that, setting aside legal and financial considerations, the Town opposes the preemption, by the Telecommunications Act of 1996 or any other comparable federal or state legislation or regulation of the sovereign rights of the people of Lincoln, or of the duty of Lincoln Town officials to protect Town residents, their health, safety, environment, freedom of speech, and all other basic rights.

To effectuate this intent, the Board of Selectmen voted to authorize the filing of this brief as amici curiae.

LINCOLN'S RESPONSE TO THE TELECOMMUNICATIONS ACT OF 1996 AND ITS EFFORTS TO REGULATE WIRELESS COMMUNICATIONS FACILITIES

In early 1997, the Planning Board held its first public hearing to consider a proposed zoning by-law to allow the construction of Wireless Communications Facilities ("WCF") in the town by creating an overlay district.[3] In preparation for this public hearing, the board appointed a task force of resident scientists, communications engineers and a lawyer to make recommendations. This task force met with representatives from the wireless service providers and industry experts. The members also reviewed so-called propagation studies generated by the wireless service providers. Propagation studies are shown on computer created maps illustrating projected wireless communications coverage from a variety of locations and tower heights based upon local topography and other constraints. As a result of the task force's work, a number of potential sites for an overlay zoning district were identified and prioritized.

In April 1997, the Lincoln Town Meeting adopted a local zoning by-law regulating the placement of WCFs in the town. Six sites, totaling approximately 175 acres, scattered throughout the town were designated as the WCF overlay district. Two of the sites were located at the eastern and western town boundaries along State Route 2, a major arterial

---

3. An overlay district is a land use planning mechanism whereby particular uses are permitted as an "overlay" of the uses permitted in the underlying district. In an overlay district, a permitted use is one which is allowed in addition to the use permitted in the underlying district.

highway bisecting the town. The by-law provided that a WCF could be located within the overlay district upon the issuance of a special permit by the Planning Board.[4]

Throughout the process of developing a WCF by-law, public hearing and Town Meeting discussions frequently focused on the potential biological hazards of low-level microwave radiation. Each time the public, including scientists experienced in the field of radio frequency technology, expressed concern over potential health hazards, representatives of the wireless communications industry stated that under federal law, Lincoln and the Planning Board could not consider environmental or health issues relating to wireless communications technologies. Lincoln sought to reconcile these concerns with the express language of Section 704, 47 U.S.C. § 332(c)(7)(B)(iv), which prohibits a state or local governmental instrumentality from regulating "the placement, construction or modification" of a WCF "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." In a dual effort to satisfy this statutory restriction while protecting its citizens, Lincoln's by-law allows the Planning Board to consider "potential human health hazards due to radio signal radiation from the proposed facility, to the extent not contrary to federal law."

Lincoln also learned through the public hearing process that the United States Congress failed to fund research on the health effects of low-level, non-heat generating,

---

4. The substance of the Lincoln by-law is set forth in *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d 108, 111-12 n.4 (D. Mass. 2000).

microwave emissions, even though scientific studies, albeit mostly in other countries, suggested potential hazards, especially to children. Indeed, the public hearing process revealed that many other industrial countries have established the maximum acceptable threshold levels of human exposure to microwave emissions at a much lower level than those established by the United States. Moreover, Lincoln learned that the current acceptable emission standards established by the FCC fail to consider non-thermal biological effects of microwave energy. Original standards for public safety, adopted by the FCC, were based on the heating effects on biological tissue of low levels of microwave energy. The standards completely neglected to consider non-thermal effects of microwave emissions on humans. Several recent peer-reviewed scientific studies have raised significant concerns about such hazards, especially to children. While the FCC has failed to conduct studies of either thermal or non-thermal biological effects from microwave energy, it has dismissed the hazards of such effects and Congress has not funded any of the proposed independent research by the Environmental Protection Agency (EPA). *See* Petition for Writ of Certiorari, pp. 7-11.

During its hearing process, Lincoln also heard evidence that each microwave antenna has a limited capacity regarding the number of calls it can handle at one time. Therefore, as demand increases, more antennas will be required and the environment will become more saturated with microwave emissions, especially in areas with high traffic volumes, such as Lincoln. Yet, there are no FCC regulations on microwave energy which address the cumulative effect of multiple emitters.

Despite Lincoln's careful planning process, a provider of personal wireless services has succeeded in overriding the town's by-law to locate a tower outside of the overlay district. *Omnipoint Communications MB Operations, Inc. v. Town of Lincoln*, 107 F. Supp. 2d 108 (D. Mass. 2000). As a result, the town will now have an 89-foot high red and white striped tower with a blinking red light less than five feet from the neighboring property in a developed residential neighborhood. While this WCF will be constructed regardless of the outcome of this petition, the town's elected officials, the Board of Selectmen and the Planning Board, urge that certiorari be granted so that in the future local authorities will have the right to consider and protect public health and safety when the federal government has failed in its responsibility to set realistic health standards for cellular microwave emissions.

REASONS FOR GRANTING THE WRIT

Since the passage of Section 704, local zoning authorities across the country have struggled with the task of balancing the mandate of the federal law to encourage the build-out of a national telecommunications network with traditional local land use concerns. *See*, for example, *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688 (4th Cir. 2000); *Town of Amherst, NH v. Omnipoint Communications Enterprises, Inc.*, 173 F.3d 9 (1st Cir. 1999); *Aegerter v. City of Delafield*, 174 F.3d 886 (7th Cir. 1999); *Omnipoint Communications, Inc. v. City of Scranton*, 36 F. Supp. 2d 222 (M.D. Pa. 1999); *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F. Supp. 732 (C.D. Ill. 1997). Nonetheless, despite local efforts to control the spread of tall towers dominating the landscape, the towers are becoming ubiquitous features and local authorities are losing

the battle to the telecommunications industry. *Omnipoint Communications MB Operations, LLC v. Town of Lincoln*, 107 F. Supp. 2d at 121. Until the filing of the petition which is now before the Court, the Lincoln authorities believed that their hands were tied in terms of attempting to regulate the placement of a WCF based on health or environmental effects. The pending petition presents the Court with the opportunity to redress this imbalance by adding fundamental constitutional principles of federalism to the equation.

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." As recently explained in *Alden v. Maine*, 527 U.S. 706, 749 (1999), this constitutional mandate avoids "state governmental processes" from being "denigrate[d]" by "plenary federal control." While the particular context in *Alden* differed from that presented here, the principle is the same: Congress may not dictate that states follow a particular procedure which imposes on state sovereignty, that is, preempts state action, without risking violation of the Tenth Amendment. Principles of federalism which allow Congress to preempt state action are effectuated only when the federal government then acts to regulate in the area which it has preempted. *Alden*, 527 U.S. at 749; *Petersburg Cellular Partnership*, 205 F.3d at 705-06 (Niemeyer, J., concurring). When the federal government, however, first preempts and then fails to regulate, the Tenth Amendment requires that the states and the people retain that authority. *See* Petition for Writ of Certiorari, pp. 22-23. As applicable here, the right of the states and the people therefore may not be preempted, under the supremacy clause, from regulating the environmental effects of radio frequency emissions while the FCC fails to do so, without running afoul of the Tenth Amendment.

The Second Circuit paid lip service to this principle when it disposed of the issue in *Cellular Phone Task Force*, 205 F.3d at 95, stating: "Congress may preempt state and local governments from regulating the operation and construction of a national telecommunications infrastucture." However, the Second Circuit failed to correctly apply the principle. As noted by Judge Niemeyer in his concurring opinion in *Petersburg*, in approving the position of the local zoning authority, Section 704 requires local zoning authorities to "employ the standards Congress mandated in deciding the siting of wireless communication facilities. This uninvited intrusion into traditional state and local authority . . . leaves the state or locality with 'no choice at all.' " 205 F.3d at 697, 702-703. Accordingly, without risking violation of the Tenth Amendment, the federal government may not simultaneously preempt local regulation and then fail to assume the responsibility for protecting the public health and safety which it has appropriated to itself. *Id.* at 705-06.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

JOEL B. BARD
Counsel of Record
PATRICIA A. CANTOR
KOPELMAN AND PAIGE, P.C.
Attorneys for Amici Curiae
Lincoln, Massachusetts and
the Lincoln Planning Board
31 St. James Avenue
Boston, MA 02116
(617) 556-0007

(8)

Supreme Court, U.S.
FILED
OCT 18 2000
CLERK

No. 00-393

In the

Supreme Court of the United States

CITIZENS FOR THE APPROPRIATE PLACEMENT OF THE COMMUNICATION FACILITIES, ET AL.

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Second Circuit

AMICUS CURIAE BRIEF OF CITIZENS FOR OPEN PROCESS IN ANTENNA SITING, SAN RAFAEL HILL TOWER COMMITTEE, COUNCIL ON WIRELESS TECHNOLOGY IMPACTS AND SAN FRANCISCO NEIGHBORHOOD ANTENNA-FREE UNION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Michael J. Van Zandt, Esq.
Counsel of Record
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200

22 pp

TABLE OF CONTENTS

Interests of the *Amici Curiae* 1

Summary of the Argument 2

Argument 4

A. Local Government Has a Traditional Role in Protecting Health and Safety 4

B. The Telecommunications Act of 1996 Unduly Interferes with Responsibilities of Local Government Under the California Environmental Quality Act 6

C. The Tenth Amendment, the Necessary and Proper Clause, and the Commerce Clause Do Not Allow Prohibitions on the Regulation of Telecommunications Facilities by Local Government 10

D. Local Governments in California Refuse to Consider Health Effects From Public Telecommunications Facilities Even Though They Are Not Exempt Even Under FCC's Interpretation of the Telecommunications Act of 1996 .. 13

Conclusion 17

TABLE OF AUTHORITIES

CASES

Cellular Phone Task Force v. FCC, 205 F.3d 82 (2d Cir. 2000) . 1, 13

Cellular Telephone Company et al. v. Zoning Board of Adjustment of the Borough of HO-HO-KUS, New York et al., 197 F.3d 64 (3d Cir. 1999) 5, 8

Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) 2

Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976) 8

Leonoff v. Monterey County Board of Supervisors (1990) 222 Cal.App.3d 1337, 1348 8

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-374 (1989) 8

Printz v. United States, 521 U.S. 898, 923-926 (1997) 11

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) 8

SBA Communications, Inc. v. Zoning Commission of the Town of Brookfield, 112 F.Supp. 2d. 233 (D. Conn. 2000) 5

Sprint Spectrum, L.P. et al. v. Board of County Commissioners of Jefferson County, 59 F.Supp. 2d 1101 (D.C. CO. 1999) 5

Wisconsin Public Intervenor, et al. v. Ralph Mortier, et al., 501 U.S. 597, 615 (1991) 4, 12

STATUTES

47 U.S.C. § 332(c)(7)(B)(iv). 16

Cal. Pub. Res. Code §§ 21000-21177. . . . . 2, 6

Cal. Public Resources Code § 21080 6

Cal. Public Resources Code § 21080(d) 7

Cal. Public Resources Code § 21081(b) 8

Cal. Public Resources Code § 21083(c) 7

Cal. Public Resources Code §§ 21091-21092 7

Cal. Public Resources Code § 21167 7

California Environmental Quality Act 2, 4, 5

Clean Air Act, 42 U.S.C. § 7543(b) 10

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 et seq. 11

Federal Water Pollution Control Act, 33 U.S.C. § 1316(c) 10

First Amendment to the U.S. Constitution. 10

National Environmental Policy Act, 42 U.S.C. § 4321-4370e 7, 8

Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b) 10

Telecommunications Act of 1996. . 2, 3, 5, 6, 8, 11, 12, 13, 14, 15, 16, 17

Tenth Amendment to the United States Constitution 1, 3, 10

OTHER

Press Release from U.S. Department of Transportation, Office of Public Affairs, January 7, 1998 4

"Pulsed high-frequency electromagnetic field affects human sleep and sleep electroencephalogram," Alexander A. Borbely, et al. *Neuroscience Letters* (1999) 9

"Electromagnetic fields (1.8 Ghz) Increase the Permeability to Sucrose of the Blood-Brain Barrier In Vitro," A. Schirmacher, et al., *BioElectroMagnetics*, Vol. 21, No. 5 10

Interests of the Amici Curiae

Amici Curiae are "Citizens for an Open Process in Antenna Siting" ("COPAS"), "San Rafael Hill Tower Committee," "Council on Wireless Technology Impacts," and San Francisco Neighborhood Antenna-Free Union" ("SNAFU") of Marin and San Francisco Counties in the State of California.[1] Amici are organizations which have participated in local government decision-making with regard to the siting of telecommunications facilities. Amici have received the written permission of the parties and intervenors to file a brief in support of the petition. Amicus "Council on Wireless Technology Impacts" is a non-profit consulting and educational organization devoted to the issue of informing citizens and government on the potential health impacts from wireless technologies, including cellular phones, personal communications systems, radio and television broadcasts, and other forms of wireless communication. Each of the Amici has encountered great reluctance and at times outright prohibitions from local governmental bodies to consider input to the siting of telecommunications facilities based on health considerations. The resistance by local government to even hear public comments on health considerations is born from the perceived preemptive effect of Section 704 of the Telecommunications Act of 1996. 47 U.S.C. § 332(c)(7)(B)(iv). Amici agree with the petitioners that section 704 of the Telecommunications Act of 1996 violates the Tenth Amendment to the United States Constitution and unduly interferes with state and local government decisions that are traditionally within the realm of protection of local health and safety interests. Moreover, the decision of the Second Circuit Court of Appeals in *Cellular Phone Task Force v. FCC,* 205 F.3d 82 (2d Cir. 2000)(reproduced at

---

[1] Counsel for Amici Curiae herein has prepared the brief on behalf of the Amici and no other person or entity has made a monetary contribution in whole or in part to the cost of its preparation.

Petitioners' Appendix ("A") at A-1) will have the effect of chilling public participation in environmental decisions of local governments and undermines the State of California's statutory requirements that local governments analyze and evaluate the environmental health effects of proposals which they must approve under the California Environmental Quality Act. Cal. Pub. Res. Code §§ 21000-21177.

Summary of the Argument

Local and state governments have a strong interest in the protection of the health and safety of their citizens. The police power of the state can be invoked to protect citizens when health and safety protections are threatened. The proliferation of cellular telephones across the nation is causing more and more local governments to face the issue of where to place all of the antennas needed to support the millions of cellular telephones now in use. The Telecommunications Act of 1996 is interfering with the traditional decision making authority of local governments because of the perceived preemptive effect of section 704 of the Act. Local government planning bodies are being advised that they may not consider, nor may they listen to public comments concerning the health effects of telecommunications facilities.

Under California law, local and state governments are required to analyze and evaluate the potential environmental impacts from their own proposed actions and those actions by private citizens or entities that must be approved by local or state government. The lead agency must prepare environmental documentation evidencing its evaluation of the environmental effects of the proposal under the California Environmental Quality Act ("CEQA"). Cal. Public Resources Code §§ 21000-21177. The lead agency must evaluate the potential impacts of the proposal on human beings and the public has a right to participate in the evaluation process by oral and written comments. Local

governments in California are not evaluating, nor are they considering the potential environmental impacts from telecommunications facilities because of the perceived preemptive effect of section 704 of the Telecommunications Act of 1996. The body of scientific research on potential health effects from telecommunications facility emissions supports a "fair argument" under CEQA that such impacts must be analyzed and evaluated. Public participation in the CEQA process is being chilled based on local governments' refusal to consider these health effects. Therefore, the Act is unduly interfering with the dictates of state law with regard to analyzing environmental impacts from telecommunications facilities on humans under California law.

The Tenth Amendment to the U.S. Constitution, the Necessary and Proper Clause and the Commerce Clause cannot be used by the Congress to compel states to require or prohibit acts. The Telecommunications Act of 1996 is constitutionally infirm because it seeks to prohibit state and local governments from considering the health effects from telecommunications facilities. Congress has dealt with this dilemma in the past by passing federal environmental legislation that allows states to enforce federal environmental standards while preserving the states' right to adopt more stringent standards. This accomplishes the federal goals but does not unreasonably interfere with state interests.

Local governments are applying the perceived preemptive effect of section 704 of the Telecommunications Act of 1996 prohibiting them from considering environmental effects from private wireless telecommunications facilities that are in compliance with FCC emissions standards to public telecommunications facilities. The plain language of section 704 of the Act regulates "personal wireless service facilities" only and in no way affects public wireless facilities. Nonetheless, local governments, confused about the application of the Telecommunications Act, are refusing to consider health effects from facilities to which the act clearly does

not apply. This is further evidence of the unconstitutional intrusion by the Act into areas of local concern.

Argument

A. Local Government Has a Traditional Role in Protecting Health and Safety

Traditionally, local and state governments have a strong interest in the protections of the health and safety of their citizens. See *Wisconsin Public Intervenor, et al. v. Ralph Mortier, et al.*, 501 U.S. 597, 615 (1991). The police power of the state and local government can be invoked to protect health and safety of the citizens when they are threatened. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). Local governments, in particular, use the exercise of the police power in the area of land use decisions to protect the health and safety of citizens and to promote land use policies. The federal government is neither empowered nor well suited to deal with land use issues at the local government level. Traditional principles of federalism reserve to the states and local governments decision making authority on health and safety issues that affect their citizens. Therefore, the federal government should only intrude on local issues dealing with health and safety if there is a compelling federal governmental interest and such intrusion does not run afoul of the Tenth Amendment protections and principles of federalism.

The proliferation of telecommunications facilities across this country, especially cellular telephone antenna sites, is pressuring local governments to find more and more suitable sites for these antennas. The number of cellular phones in this country has increased from 345,000 in 1985 to over 50,000,000 in 1998. The number is expected to double in the year 2000. Press Release from U.S. Department of Transportation, Office of Public Affairs, January

7, 1998. This proliferation of cellular phones has been accompanied by a corresponding proliferation of antenna facilities to transmit their signals. Cellular phone companies are placing these antennas in residential areas, on schools, churches, near hospitals, and in fact, any available site so they can provide uninterrupted cell phone coverage. Local government planning commissions are finding requests for siting of wireless communications facilities are a major part of their workload.

The Telecommunications Act of 1996 is interfering with the traditional role of local governments in siting decisions within their jurisdiction because the wireless telecommunications industry is using the Act to support discrimination claims and claims of improper decision making by local government based on health considerations. See for example, *Cellular Telephone Company et al. v. Zoning Board of Adjustment of the Borough of HO-HO-KUS, New York et* al., 197 F.3d 64 (3d Cir. 1999)(case remanded with instructions to review gap in service requirements under Telecommunications Act); *Sprint Spectrum, L.P. et al. v. Board of County Commissioners of Jefferson County,* 59 F.Supp. 2d 1101 (D.C. CO. 1999)(Board decision upheld as there was no evidence that Board favored one supplier over another); *SBA Communications, Inc. v. Zoning Commission of the Town of Brookfield,* 112 F.Supp. 2d. 233 (D. Conn. 2000) (denial of antenna application based on health and safety concerns reversed). Local governments are placed in an impossible position, trying to fulfill the mandate to protect health and safety, but handicapped by the perceived preemptive effect of the Telecommunications Act of 1996. Local planning commissions, city councils and county boards of supervisors are being advised not only that they cannot consider health effects from radio frequency radiation ("RFR") but also that they may not even listen to presentations by concerned citizens lest such information find its way into the public record and taint the decision making process. Such advice is causing a crisis of confidence in local government

caused by a federal statute seemingly designed to protect the telecommunications industry.

In San Francisco, for example, the City and County of San Francisco has adopted Wireless Telecommunications Services Guidelines for the placement of antennas. The guidelines do not take into consideration the health and safety effects of RFR. As such, the City Planning Commission routinely refuses to consider any input from citizens on the issue of health effects from RFR. The City is also preventing the consideration of health effects in the development of long-range plans by the City-chartered Telecommunications Commission. Representatives from amicus SNAFU have been literally advised that they cannot speak at the Telecommunications Commission hearings on the issue of health effects from telecommunications facilities. Representatives from amicus COPAS were told not to raise health concerns before the Planning Commission of the Town of Tiburon, California. Such prohibitions have a chilling effect on public participation in local government decisions and undermine the local governments' authority to protect citizens from threats to health and safety.

B. The Telecommunications Act of 1996 Unduly Interferes with Responsibilities of Local Government Under the California Environmental Quality Act

Under the California Environmental Quality Act (Cal. Public Resources Code § 21000-21177), local governmental bodies are required to analyze and evaluate the environmental impacts of proposals requiring their approval. Cal. Public Resources Code § 21080. The lead agency for such analysis must determine, based on a substantial evidence test, whether sufficient evidence exists to prepare a detailed environmental impact report of the potential environmental impacts from the proposed action. Id. at § 21080(d).

One of the primary considerations of the governmental agency in deciding if there are environmental effects is whether the potential environmental impacts of the proposal will cause substantial adverse effects on human beings, either directly or indirectly. Id. at § 21083(c). A key provision of the California Environmental Quality Act is public participation in the review and commenting on environmental impacts of the proposed action. Id. at § § 21091-21092. The governmental agency preparing the environmental impact report must respond to comments from the public in writing. Id. An environmental impact report that fails to address environmental impacts on the health of a human being from the proposal would be fatally defective and subject to being challenged in state court through an administrative mandamus process. Id. at § 21167. The public participation and judicial challenge processes of the California Environmental Quality Act are well used by the citizens of California to challenge governmental decisions that fail to adequately consider the potential environmental consequences of proposed actions, much like the processes established under the comparable federal National Environmental Policy Act. 42 U.S.C. § 4321-4370e.

In several cases in California, where local governments are required to analyze the environmental impacts of proposals, the local governments have refused to consider, in the environmental impact reports prepared under the California Environmental Quality Act, the environmental impacts of RFR on the health of human beings. Citizens have submitted comments to such reports but the governmental bodies have refused to consider any health effect information, indicating that such consideration is not allowed if the facilities meet the FCC standards for RFR emissions. In fact, the governmental bodies are refusing to evaluate health effects in the environmental impact reports, stating merely that the facilities will meet FCC requirements, and, therefore, no consideration of health effects is required. This position, fostered by the perceived

preemptive effect of section 704 of the Telecommunications Act of 1996, has cut off debate and consideration at the local level of potential health effects from RFR exposure.

The California Environmental Quality Act requires a full analysis of the environmental impacts of a proposal if a "fair argument" can be made that environmental impacts will result from the proposed action. *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348. The "fair argument" standard is roughly comparable to the "hard look" doctrine for reviewing environmental documents under the National Environmental Policy Act of 1969. See e.g. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-374 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). However, the "fair argument" standard is much less strict than the "hard look" doctrine, in that any reasonable and legitimate argument that a potentially significant environmental impact may result from the proposed action is sufficient to require the governmental agency to prepare new documentation addressing the potential environmental impacts pressed upon the governmental agency through the public input process. *Leonoff, supra,* 222 Cal. App. 3d at 1348. Mitigations for the potential impacts must be evaluated and implemented by the governmental body unless a statement of overriding consideration determines that the impacts cannot be mitigated and the decision makers believe that specific overriding economic, legal, social, technological , or other benefits outweigh the significant effects on the environment. Cal. Public Resources Code § 21081(b). In the case of health considerations from RFR exposure, the petition provides numerous examples of studies and internationally adopted standards that recognize and protect against non-thermal health effects from RFR emissions. These studies are more than sufficient to satisfy the criteria under California law that a "fair argument" can be made that there is a potential for an environmental impact on human beings from RFR.

Since the original petition was filed in this action some very important new information has been developed that should add to the compelling data already in existence that RFR causes deleterious effects on human health. In June 2000, a number of eminent scientists and government officials participated in a conference in Salzburg, Austria entitled the "International Conference on Cell Towers & Public Health." The international conference was convened by the State of Salzburg and attended by prominent scientists, public health officials and citizens from around the world. The panel of scientists who presented their original research and studies on RFR at the meeting agreed on a resolution setting standards on Mobile Telecommunications Base Stations. The central point of this resolution is to call for a sharply reduced exposure limit to the combined emissions from all high frequency radiation sources. The recommended standard by the scientific community assembled in Austria was for an exposure limit many times more stringent than the current exposure limit set by the FCC, 10 uW/cm2 as compared to 100 mW/cm2.

There are also some recent research findings further linking the exposure to RFR and adverse effects on human health. Alexander A. Borbely, et al. published a study in *Neuroscience Letters* (1999) titled "Pulsed high-frequency electromagnetic field affects human sleep and sleep electroencephalogram." Dr. Borbely and his colleagues reports that sleep patterns and electroencephalogram (EEG) readings are altered with 900 MHz cell phone exposures during sleep. Alternating fifteen minute on-and-off intervals with RF exposure produced a reduction in the amount of waking after sleep onset from eighteen minutes to twelve minutes. In addition spectral power of the EEG in non-rapid eye movement sleep was increased. The maximum rise occurred in the 10-11 Hz and 13.6-14 Hz bands during the initial part of sleep. The results demonstrate that cell phone radio frequency energy may promote sleep and modify the sleep EEG. Vera Garaj-Vrhovac reports on exposure to

microwave radiation in Volume 39, No. 13 of *Chemosphere* (1999) in an article entitled "Micronucleus Assay And Lymphocyte Mitotic Activity In Risk Assessment Of Occupational Exposure To Microwave Radiation." In this study the author reports that exposure to microwave radiation of only 10-20 uW/cm2 in workers chronically exposed to 1250-1350 MHz was sufficient to cause an increase in micronuclei, an aberrant form of DNA. Finally, A. Schirmacher, et al. published a study on the effects of RFR on the blood- brain barrier in Volume 21, No. 5 of *BioElectroMagnetics*, entitled "Electromagnetic Fields (1.8GHz) Increase the Permeability to Sucrose of the Blood-Brain Barrier In Vitro." The authors report that when an in vitro model of the blood-brain barrier was exposed to 1.8 GHz, there was an increase in permeability to sucrose across the barrier. Researchers state that for the first time a definite, reproducible effect of microwave radiation exposure on the blood-brain barrier in vitro has been achieved. The exposure conditions of this study resemble those used in mobile telecommunications. The scientific evidence is mounting that RFR can affect human health.

Nonetheless, the local governmental governments refuse to consider such evidence, based on fear that they will run afoul of the perceived preemptive effect of the federal law. Public participation in the decision making process of local government is being chilled by this federal directive. Such public right to comment upon and bring to the attention of lawmakers concerns that could affect the outcome of local government decision-making is protected speech under the First Amendment to the U.S. Constitution.

C. The Tenth Amendment, the Necessary and Proper Clause, and the Commerce Clause Do Not Allow Prohibitions on the Regulation of Telecommunications Facilities by Local Government

We agree with the petitioners that the U.S. Constitution does not allow the federal government to prohibit local governments

from regulating locally placed telecommunications facilities. This Court has ruled very recently that the Tenth Amendment, the Necessary and Proper Clause and the Commerce Clause cannot be used to compel states to require or prohibit acts, even if the federal government itself has the power to so require or prohibit such acts. *Printz v. United States*, 521 U.S. 898, 923-926 (1997). Section 704 of the Telecommunications Act of 1996 is constitutionally infirm because it seeks to prohibit states from considering health effects from RFR, despite the specific requirements of California state law the mandate local governments to consider such health effects. As the Court stated in *Printz:*

> When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at 2376-2377, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton).

521 U.S. at 923-924. Based on these considerations, the prohibition expressed in section 704 of the Telecommunications Act of 1996 cannot pass constitutional muster.

Congress has dealt with this dilemma in the past in the arena of environmental protection. Recognizing the tension between federal policy for protection of the environment and the need to incentivize the states to implement that federal policy, the Congress passed laws that allowed the states to administer their own environmental programs by way of delegation from the federal government. See for example, Federal Water Pollution Control Act, 33 U.S.C. § 1316(c)(allowing states to enforce standards under the

Act if they are at least as stringent as the federal standards); Clean Air Act, 42 U.S.C. § 7543(b)(states may adopt standards at least as protective as federal standards); Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b)(states are authorized to enact their own programs if they are equivalent to the federal program, are consistent with federal and other state programs and provide for adequate enforcement).

The scheme set forth in the Federal environmental statutes mentioned does not require or prohibit state acts. On the contrary, the federal environmental scheme encourages the states to administer their own programs but allows the states the flexibility to establish their own standards, even if they are more stringent than the federal standards. A clear example of this is found in the Court's decision in *Wisconsin Public Intervenor, et al. v. Ralph Mortier, et al.*, 501 U.S. 597 (1991). In *Wisconsin Public Intervenor*, the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136 et seq., did not preempt state governments from regulating pesticides. The Court noted that not only did the Act not preempt local governments from regulating pesticides, but the Act implied a regulatory partnership between federal, state and local governments, noting that section 136t(b) of the Act required the Administrator of the Environmental Protection Agency to cooperate with "any appropriate agency of any State or any political subdivision thereof . . . ." *Wisconsin*, 501 U.S. at 615. While FIFRA does not contain the same express language of the Telecommunications Act, there are parallels to be learned from the relationship between federal laws regulating local environs and attempts to restrain states from acting in the same area. Especially in the area of health and safety, the courts should be wary of intrusion by the federal government into the local arena.

It is important to note the distinction the Third Circuit Court of Appeals has made with regard to the regulatory effect of the Telecommunications Act of 1996 in *Cellular Telephone Company,*

supra, 197 F.3d at 71. The Third Circuit states:

> The Telecommunications Act bars local regulation that prohibits or has the effect of prohibiting personal wireless services, not the facilities that provide those services. Under the right conditions, it may be possible to provide adequate level of personal wireless services to a particular community solely through facilities outside that community. We are not prepared to hold that every community must permit wireless communication facilities somewhere within its borders regardless of the need for such facilities, nor do the facts of this case require us to decide the issue now. Id.

Given overriding constitutional considerations that would restrain federal authority to prohibit consideration of health effects from telecommunications facilities, the statute may be construed not to prohibit the provision of services but merely to regulate the placement of such facilities, if the local government determines that considerations of health, safety, or other traditional local land use criteria demands such regulation.

D. Local Governments in California Refuse to Consider Health Effects From Public Telecommunications Facilities Even Though They Are Not Exempt Even Under FCC's Interpretation of the Telecommunications Act of 1996

In Marin County, California, the local governments have created a Joint Powers Authority for the purpose of providing wireless communications among fire, police, emergency services and other public entities. The system, known as the Marin Emergency Radio Authority or "MERA" is intended to provide routine and

emergency wireless telecommunications among the various local governmental agencies. The system requires the siting of seventeen large antenna towers in various parts of the County, some of which are located in or near residential neighborhoods. Each town or city where an antenna must be sited must review the MERA proposal and approve the erection of the antenna towers and the operation of the antennas. MERA has prepared an environmental impact report under CEQA that does not analyze or evaluate health effects from the proposal. MERA did not accomplish the health analysis because it understood that such analysis was preempted by section 704 of the Telecommunications Act of 1996.

The Telecommunications Act of 1996 contains a provision which seemingly prevents local communities from regulating telecommunications facilities based on the environmental effects of RFR. The relevant provision of the Act provides:

> § 332. Mobile services
> (c)(7) Preservation of local zoning authority. (A) General authority. Except as provided in this paragraph, nothing in this Act [47 USCS §§ 151 et seq.] shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

Thus it is the intent of the statute not to interfere with local zoning or planning decisions with regard to "personal wireless service facilities," except as provide for in the same paragraph. It is important to note that the extent of the preemption purportedly extends only to the category of "personal wireless service facilities."

The statute goes on to specify the limits on local and state government authority over siting and planning decision regarding mobile phone services. The statute provides:

(B) Limitations. (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Thus the statute protects the telecommunications industry from discrimination and from the arbitrary regulation of personal wireless service facilities that has the effect of preventing service. The act also sets forth requirements for timely review of applications of such facilities and for the standard of review in a challenge to a local or state government decision denying an application to place, construct or modify personal wireless service facilities.

Finally, the act addresses the limits placed on consideration of health effects from personal wireless service facilities, stating:

> (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency

emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

It is this provision which unconstitutionally intrudes on state and local government decisions and has the effect of prohibiting a state or local government from regulating a facility if the facility complies with the FCC standards. However, the prohibition applies only to "personal wireless service facilities."

Some governmental agencies are attempting to apply this prohibition to all wireless telecommunication facilities, whether they are "personal" or otherwise. The MERA example is important because the application of the prohibition further intrudes into local decision making to a place where even the Congress did not intend. To explain why the prohibition does not apply to public wireless service facilities, one need only review the definitions in the Telecommunications Act. The definitions provide:

(C) Definitions. For purposes of this paragraph –
(i) the term "personal wireless services" means commercial mobile services, unlicenced wireless services, and common carrier wireless exchange access services;
(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and
(iii) the term "unlicenced wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)[47 U.S.C.S. § 303(v)].

There are some key phrases in this particular section of the Act. The first is the reference in section 332(c)(7)(B)(iv) to the fact that no state or local government may regulate the placement, construction, and modification of **personal wireless service facilities** on the basis of the

environmental effects of RFR. At first glance that would seem to preclude local governments from regulating the MERA facilities on the basis of RFR effects. However, the heading for section 332(c) specifies that it relates to commercial and private mobile services. Clearly, MERA does not involve either commercial or private mobile services.

Moreover, section 332(c)(7)(C)(i) defines "personal wireless services" as commercial mobile services, unlicenced wireless services, and common carrier wireless exchange access services. Clearly, MERA does not involve commercial services and is not part of a common carrier exchange service. The MERA facilities are also required to be licensed because there is no general exemption for emergency radio systems. Therefore, section 332 of the Act does not preempt state or local governments from regulating the environmental effects of RFR from public communications services. The confusion caused by the Telecommunications Act on local decision making needs to be addressed by the Court and local authority and autonomy restored.

Conclusion

The Petition for Writ of Certiorari should be granted.

Dated: San Francisco, California
December 4, 2000

MICHAEL J. VAN ZANDT, ESQ.
Counsel of Record
McQUAID, METZLER, BEDFORD
& VAN ZANDT, LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200